82-1971

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL M. SCHAEFER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES B. HECHT
RICHARD V. SICA
KURT A. MILLER
Counsel for Petitioner

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7757

QUESTION PRESENTED FOR REVIEW

WHERE it is the unchanged policy of the NLRB and its General Counsel to defer to collective bargaining agreements which settle unfair labor practice charges and which comply with specific criteria,—

AND WHERE the NLRB found and held that the Employer-Petitioner made precisely such an agreement under which the Union-Charging Party waived backpay to the six involved employees (of whom four thereafter gave releases of backpay),—

SHOULD THIS COURT reverse the Court of Appeals, below, and deny enforcement of the order of the NLRB which varies fatally from said deferral policy and which requires the Employer-Petitioner to pay backpay to the six employees?

[*May it please the Court to note here:* On this question, the decision of the Third Circuit Court in this case is in direct conflict with the decision in *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (Fourth Circuit, 1981).]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUES:

RULES:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

MICHAEL M. SCHAEFER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

A Writ of Certiorari is respectfully sought to review the judgment of the Court of Appeals by which enforcement was granted of an order of the National Labor Relations Board (hereinafter "NLRB") requiring the Employer-Petitioner to pay specific sums of backpay to six employees.

OPINIONS BELOW

The initial decision and order of the NLRB (App. A) is reported at 246 NLRB 181 (1979). The supplemental decision and order of the NLRB (App. B) is reported at 261 NLRB No. 42 (1982). The initial opinion of the Court of Appeals (App. C) is reported at 697 F.2d 558. The opinion of the Court of Appeals by which the petition for rehearing of the Employer-Petitioner was denied (App. D) is reported at 702 F.2d 57 (Garth, J., dissenting).

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1983 (See App. E). The timely petition for rehearing was denied by the Court of Appeals on March 11, 1983 (See

App. D). The jurisdiction of this Court is invoked under 28 USCA §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved in this Petition is the National Labor Relations Act, as amended, 29 U.S.C.A. §141 *et seq.* (hereinafter called the "Act"). The provisions of the Act which are relevant to this proceeding are set out verbatim, below:

1. Section 1, 29 U.S.C.A. §151, reads in part:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ."

2. Section 7, 29 U.S.C.A. §157, reads:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

3. Section 8(a), 29 U.S.C.A. §158(a), reads in part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [Section 7] of this title;

". . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization; . . .

". . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

4. Section 8(d), 29 U.S.C.A. §158(d), reads in part:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

5. Section 10(a), 29 U.S.C.A. §160(a), reads in part:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . ."

6. Section 10(c), 29 U.S.C.A. §160(c), reads in part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . ."

7. Section 201, 29 U.S.C.A. §171, reads in part:

"It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees. . . ."

8. Section 301(a), 29 U.S.C.A. §185, reads:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

The Employer-Petitioner (hereinafter "Schaefer") is a sole proprietor engaged in the recovery, sale and distribution of slag and other raw materials. He employs approximately 250 persons. For many years, substantial groups of his employees have been represented by Operating Engineers Local 66, Teamsters Local 341, and Laborers Local 1058. The unfair labor practice charges which led to this proceeding grew out of the efforts of Local 66, in 1977, to organize a small unit of unorganized employees who perform routine maintenance on Schaefer's trucks. Schaefer has no anti-union *animus*, but he preferred doing business with Laborers Local 1058. He thus attempted, during the organizing efforts of Local 66, to assist Local 1058. In October of 1977, Local 66 filed a representation petition with the NLRB. Local 1058 intervened. An agreement for a Consent Election was executed. A Board-supervised

election was held on December 15, 1977. Despite Schaefer's continued support for Local 1058, the eligible voters chose Local 66 by a six to three margin, no one voting for no union. On December 23, 1977, Local 66 was duly certified by the Board as the exclusive collective bargaining representative for this unit. Collective bargaining then commenced between Local 66 and Schaefer.

However, Local 66 had a basis to file unfair labor practice charges by reason of *inter alia*, (1) the apparent unlawful assistance by Schaefer to Local 1058 and (2) the layoffs of six unit employees. Therefore, on March 6, 1978, during contract negotiations with Schaefer, Local 66 filed with the NLRB, under Section 8(a) of the Act, the charges which form the basis of these proceedings. Included therein were charges that Schaefer laid off the six employees for engaging in protected activity under Section 7 of the Act. See 29 U.S.C.A. §§157 and 158(a)(1).

These charges, of course, constituted particularly effective bargaining chips for Local 66. At this point in collective bargaining, Schaefer wisely consulted with a lawyer, his son, Michael P. Schaefer, and followed the lawyer's advice. Thereafter, Schaefer put on the bargaining table his *unconditional* request that the charges be dropped by the Union as part of the overall package of wages, hours and conditions of employment. In effect, Schaefer asked Local 66 to state their price to drop the charges. In so doing, Schaefer did not take the matter to an impasse. By reason of this unconditional posture in the bargaining sessions, the price went up, indeed. The collective bargaining agreement which was signed on March 17, 1978, was highly favorable to the employees (and the NLRB made a specific finding to this effect). In consideration of this favorable agreement, Local 66 specifically agreed to withdraw their unfair labor practice charges (and the NLRB made an express finding to this effect, too).

Regretably, Local 66 did not honor its agreement to withdraw the unfair labor practice charges. Thus, on April 27, 1978,

the General Counsel filed the complaint in this case and proceeded to hearing.

During the hearings, Schaefer proved the agreement upon which he relies. In response, the General Counsel amended the complaint to charge that Schaefer had conditioned the entire collective bargaining agreement upon the agreement of Local 66 to withdraw the charges and, thus, that Schaefer had refused to bargain in good faith as required by §8(a)(5) and §8(d) of the Act. 29 U.S.C.A. §158(a)(5) and (d). In response, the Board found and held: (1) that Local 66 agreed to withdraw the charges, (2) that Schaefer's request for this agreement was unconditional and (3) that Schaefer had not failed to bargain in good faith. The Board also found, in effect, that the entire collective bargaining agreement was highly favorable to the employees. See App. A, pp. 25a-26a, 35a and 30a (note 21), 246 NLRB at 187, 190 and 188 (note 21).

However, the Board refused to dismiss the case on the basis of the agreement of Local 66 to withdraw the charges. In this regard, the Board held that (1) no such agreement was binding upon the Board and (2) the Board would not exercise its discretion to dismiss by reason of any such agreement. As a consequence, the Board issued an order requiring Schaefer, *inter alia*, to cease and desist from further assistance to Local 1058, to post the required notice to employees, and to pay backpay when computed.

[Schaefer must note here that the Board expressly found for Schaefer, on the agreement to withdraw charges, in App. A at pages 25a-26a. (246 NLRB at 187.) Thereafter, at page 36a, (246 NLRB at 190), the Board states that "something of the sort was agreed to by Local 66. . ." but that there was no "need to make such a finding because, assuming, *arguendo*, that such a commitment was made, that sort of agreement does not detract from the power of the Board. . ." to proceed. The latter statement cannot detract from the earlier finding. The matter must be noted here to eliminate confusion.]

Schaefer and the General Counsel then executed a stipulation under which Schaefer retained the right to contest payment of backpay to the six employees but, otherwise, agreed to comply with the order. Schaefer also offered compromise payments to each of the six employees. Four of these employees accepted further sums of money from Schaefer and executed releases of backpay.

In the Backpay Hearings which followed, Schaefer's main defense was as follows: No backpay is payable because (1) the agreement of Local 66 to withdraw the charges constitutes an agreement to waive backpay, and (2) four of the six employees thereafter concurred in their Union's agreement by accepting compromise sums and releasing backpay. The Board rejected these defenses on the basis that its initial decision and order constituted the law of the case and that employees cannot waive backpay.

Therefore, in the Supplemental Decision and Order of the Board, Schaefer was ordered to pay, to the six employees, backpay in the total sum of $27,489.98. The Court of Appeals for the Third Circuit considered the timely cross petitions, granted enforcement, and entered judgment. Said Court then denied Schaefer's timely petition for rehearing by the Court *in banc*, Garth, J., dissenting. [The basis for federal jurisdiction in the court below is 29 U.S.C.A. §160(e) and (f).] The Compliance Office of the Board's Sixth Region now advises, informally, that pre-judgment interest amounts to about $15,850.00. Thus, the amount in controversy is now about $43,300.00.

In the meantime, Schaefer has lived up to his agreements with Local 66 *and* the General Counsel. For example, under the three-year labor agreement with Local 66, Schaefer's projected cost *increases* were considerably greater than $43,300.00. Moreover, Schaefer has bound himself to a Board order requiring, *inter alia*, that he cease and desist from giving aid or assistance to any labor organization in any election campaign, etc. Thus, there has been full vindication of public

rights under the Act. However, if Schaefer must pay the back-pay judgment in this case, then the six employees will be unjustly enriched and Schaefer will be penalized. Neither of these consequences is sanctioned by the Act, the *raison d'etre* of which is collective bargaining agreements which resolve labor disputes.

REASONS FOR GRANTING THE WRIT

I. THERE IS DIRECT CONFLICT ON THE MATTERS INVOLVED BETWEEN THE DECISION OF THE THIRD CIRCUIT COURT IN THIS CASE AND THE DECISION OF THE FOURTH CIRCUIT COURT IN *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (1981).

It is the unchanged policy of the NLRB and its General Counsel to defer to collective bargaining agreements which settle unfair labor practice charges and which meet these criteria: (1) where the agreement was made in good faith, (2) by the employer, the union and the employee, and (3) wherein the settlement involved mutual concessions (*e.g.*, reinstatement to employment but no backpay). See the Board decisions cited below, particularly the Advice Memoranda of the General Counsel in *Beloit Corporation*, 6 NLRB Advice Memorandum Reporter ¶14,177 (1979) and in *Krause Honda, Ltd.*, 8 NLRB Advice Memorandum Reporter ¶18,221 (1981).

The record shows that the NLRB varied fatally from this policy in Schaefer's case. In the same kind of case in the Fourth Circuit, the court held that the Board was bound by its policy and that enforcement of a backpay order was denied. See *Roadway Express, Inc. v. NLRB, supra.* In Schaefer's case in the Third Circuit, the court held that the Board was not bound by its policy and that enforcement of a backpay order was granted.

The Third Circuit has expressly recognized the direct conflict between its decision and the decision of the Fourth Circuit Court in *Roadway Express.* To demonstrate: —the

majority opinion of Gibbons, J., states in part (App. C, pp. 6c-7c and 697 F.2d at 561):

> "[Schaefer] argues that the backpay award is in the circumstances here presented barred by the so-called *Spielberg-Collyer* doctrine. This court in *NLRB v. Pincus Brothers, Inc.—Maxwell*, 620 F.2d 367 (3d Cir. 1980), approved the Board's policy of deferring, in some cases, to resolution by arbitration of disputes involving potential unfair labor practices within its jurisdiction. *Id.* at 371-75. *Pincus Brothers* did not involve deferral to mere private agreements, as distinct from arbitrations pursuant to the grievance-arbitration provisions of a collective bargaining agreement. There is authority, however, for the proposition that the *Spielberg-Collyer* doctrine applies to private settlement agreements negotiated in good faith involving mutual concessions and benefits. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (4th Cir. 1981); *Krause Honda, Ltd.* 8 AMR ¶18,221 (1981); *Beloit Corporation*, 6 AMR ¶14,177 (1979); *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501 (1979); *Central Cartage Company*, 206 NLRB 337 (1973)."

In the opinion by Garth, J., dissenting from denial of rehearing, the following is stated (App. D, pp. 2d and 3d-4d and 702 F.2d at 58 and 59):

> "As I read the court's opinion . . . it appears clear to me that what had been Judge Gibbon's dissenting, and therefore minority, position in *Pincus Brothers, supra*, 620 F.2d at 384-99 (Gibbons, J., dissenting), has now in effect become this court's majority position in *Schaefer*. This doctrinal reversal has been accomplished not by our court sitting *in banc*, as our procedures require in such a case, *see* Third Cir.Int.Op.P. ch. VIII(c), but rather by a panel decision which apparently disagrees with the concepts espoused by the majority of the *Pincus* panel.
>
> ". . .
>
> "Finally, I question the *Schaefer* panel's approval of the Board's actions denying deferral to the agreement

made between Schaefer and the Union. First, the Schaefer employees apparently received consideration for the withdrawal of charges. *Id.* at 560. Because the panel opinion affirms the Board's award of backpay, the employees presumably will now receive double compensation. Second, the Board itself would apparently defer to such a private settlement agreement. Indeed, the opinion in *Schaefer*, citing Board precedent and *Roadway Express, supra*, [the Fourth Circuit's decision] concedes that the Board's *Spielberg-Collyer* doctrine applies to private settlement agreements negotiated in good faith just as it does to arbitration. *See Schaefer, supra*, 697 F.2d at 561. As I have previously indicated, in my view the Board must live by the rules it has established, *see Pincus Brothers, supra*, 620 F.2d at 384 (Garth, J., concurring), and it is evident that the Board has yet to abandon its rule on deferral."

It is emphasized that there are two distinct deferral policies which are prescribed by the Board and its General Counsel. The first (or threshold) policy prescribes deferral to settlement agreements where, as here, the parties resolve the dispute by mutual agreement. The second policy prescribes deferral to the decision of the arbitrator to whom the parties present the dispute for binding resolution, where the parties were unable to resolve the dispute by mutual agreement. Both the Board and its General Counsel have prescribed rational and *separate* criteria for the application of each policy.

It is on this point, *inter alia*, that the court below seriously erred. The majority applied the criteria for the *second* deferral policy (*i.e.*, deferral to arbitration) to Schaefer's settlement agreement, where only the threshold policy can apply. The court then observed that Schaefer's dispute had not been formally arbitrated and had not been scrutinized (as the second deferral policy requires) and, therefore, that deferral was not required. See App. C, p. 8c and p. 7c, and 697 F.2d at 562 and 561. Under this gross misapplication, no settlement agreement can pass muster because, perforce, the dispute was settled and was not arbitrated. On the matter of "scrutiny," the court

seriously erred in failing to recognize the Board's holding that Schaefer did not fail to bargain in good faith.

In *Beloit Corporation, supra*, the Board's General Counsel, in an Advice Memorandum, clearly stated that the criteria for deferral to arbitration cannot be applied to a settlement agreement, but rather, the separate (or threshold) deferral policy must be applied.

In like manner, the Advice Memorandum in *Krause Honda*, the Board decisions in *Coca-Cola Bottling Company* and *Central Cartage Company*, and the decision by the Fourth Circuit in *Roadway Express, supra*, set forth the same analysis and reached the same result, *i.e.*, backpay was not allowed under the settlement agreement.

The only substantial difference between *Roadway Express* and the above-cited decisions by the Board and its General Counsel, is that the employee in *Roadway Express* did not unequivocally waive backpay. The Fourth Circuit found there to be constructive consent or acquiescence on the employee's part, and relied to some extent upon the following passage in the concurring opinion of Board Member Brown in *Collyer Insulated Wire*, (as it appears in 647 F.2d at 422):

> "That the employer and union are bound by their agreement is fundamental to collective bargaining. I also believe that an employee is bound by the acts of his bargaining agent. If an employee could initiate and repudiate the acts of his duly designated representative at his whim, the statutory objective of fostering voluntary settlement by parties to collective-bargaining agreements cannot be attained. This was not intended by Congress and is contrary to the fundamental purposes of the Act." (192 NLRB 837 at 845 (1971)).

Under the decisions of the Board and its General Counsel in *Beloit Corporation, Krause Honda, Coca-Cola* and *Central Cartage*, cited above, there is no doubt, whatever, that the court below should have denied enforcement of backpay

orders at least to those four of Schaefer's employees who concurred in their Union's agreement and released backpay.

Of greater importance to this Petition, however, there is no doubt, whatever, under the decision of the Fourth Circuit Court in *Roadway Express, supra*, that enforcement should have been denied for the backpay orders for each of Schaefer's six employees. See Rule 17-1-(a), The Supreme Court Rules - 1980 Revisions. The Schaefer decision of the Third Circuit Court is in direct conflict with the *Roadway Express* decision of the Fourth Circuit on the same matter.

Additional manifest support for the rule in *Roadway Express*, and the deferral policy in question, should be noted at this point. In the case of *The Great Atlantic & Pacific Tea Company*, 145 NLRB 361 (1963), the employer was guilty of a lockout, but followed the same settlement procedure for wages that Schaefer and Local 66 followed in this case for wages and fringe benefits, etc. In *A. & P.*, however, the Board denied backpay, stating (145 NLRB at 368):

> "The purpose of a backpay award is not to punish the respondent or to enrich employees discriminated against, but to make the employees whole, that is, to restore earnings lost because of the discrimination. In the present case, as the result of arms-length bargaining between the representative of the employees in the unit represented by the Meat Cutters and the Respondents, the two parties agreed to increase wage rates as compensation for the withdrawal of the charges. As we understand the agreement, the increase in the wage rates was to compensate employees for monetary losses suffered as the result of the lockout. If the Board were now to ignore the settlement agreement and make its usual backpay awards, employees would be made whole *more than once*. To avoid this result, we find that it will not effectuate the policies of the Act to make backpay awards to locked out employees in the unit represented by the Meat Cutters." (Emphasis supplied.)

In Schaefer's case, the decision should have been the same, despite the fact that Local 66 failed to honor its agreement.

II. The Matters Involved Are Of Great And Continuing Importance To Labor-Management Relations In The United States.

In the court below, one of Schaefer's principal positions was as follows:—In *Pincus Brothers, Inc.—Maxwell v. NLRB, supra*, the Third Circuit denied enforcement of a Board order against the employer in a discharge case, wherein an arbitrator had upheld the discharge. In so doing, the court held that the Board could not depart from its unchanged policy of deferral to arbitration in such cases. From this premise, Schaefer argued that it follows, *a fortiori*, that the Third Circuit's law prevents the Board from departing from its unchanged policy of deferral to *settlements* in such cases. It is Schaefer's emphatic position that settlement opportunities are infinitely more important than the suit or arbitration which results when settlement fails, particularly in labor-management relations.

The court sharply disagreed with Schaefer, stating, among other things, that "*Pincus Brothers* did not involve deferral to *mere private agreements* . . . ." App. C, pp. 7c and 697 F.2d at 561 (emphasis supplied). The court also restated Judge Gibbons' dissenting opinion in *Pincus Brothers* as follows (App. C, p. 7c and 697 F.2d at 561):

> "[D]eferral should be disapproved as a matter of law in cases involving alleged violations of section 7 rights, but that at least in every such case the Board's discretion to hear the case should be upheld. 620 F.2d at 398-99 (Gibbons, J., dissenting)."

On both of these points, the Schaefer court committed serious error. (However, the second quotation, above, is clearly not the court's holding, but rather is *obiter dictum*.)

The surface meaning of the Schaefer decision is that the Board *need* not follow its policy to defer to settlement agreements in Section 7 cases. On the other hand, Judge Garth expresses the view, *supra*, with which he sharply disagrees, that the Schaefer panel has reversed *Pincus Brothers* and, hence,

that the Board *must* now ignore its unchanged policies to defer to arbitration *or* to settlement agreements in Section 7 cases. See App. D, p. 2d and 702 F.2d at 58.

Regardless of how one dissects the decisions of the court below in Schaefer's case and in *Pincus Brothers*, it is at least clear that "the rug has been yanked" from beneath the grievance-arbitration procedure in grievances which involve Section 7 rights under the Act. See 29 U.S.C.A. §§157 and 158(a)(1). The Schaefer decision, below, means that an employer and a union cannot conclusively settle such a dispute. Rather, the employer-respondent can conclusively make such a settlement *only* with the Board's General Counsel (or Regional Director). In turn, this principle can give rise to another case of *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261 (1964) where the employer refuses to settle *or* to arbitrate such a grievance with the union, and cites the Schaefer decision, in the court below, as the reason for such refusal. The scope of Section 7 (and of Section 8(a)(1)) is very great and so, too, will be the damage to private grievance-arbitration if the court below is not reversed. See 29 U.S.C.A. §§157 and 158(a)(1). In addition, see the briefs of the parties in *NLRB v. Transportation Management Corp.*, October Term, 1982, No. 82-168, argued before this Court on March 28, 1983. A "Section 7 case" is presented whenever the employee or the union alleges that "protected conduct" was a "motivating factor" in the employer's decision to suspend, or discharge, or layoff, or demote, or reschedule, or reassign, or contract-out the work of, an employee, *et cetera*.

The foundation stones of the decision of the Third Circuit in *Pincus Brothers* and of the decision of the Fourth Circuit in *Roadway Express* are the decisions of this Court in *Carey v. Westinghouse*, *supra*, and / or in the *Steelworkers Trilogy*, 363 U.S. 564, 574, 593 (1960). See, in particular, 620 F.2d at 374 (and footnote 14) and at 375 (and footnote 18) in the *Pincus Brothers* decision. In *Carey v. Westinghouse*, this Court accepted the principle of Board deferral to arbitration awards

in unfair labor practice disputes. In the *Steelworkers Trilogy*, this Court mandated specific performance decrees to enforce the grievance-arbitration clause in a labor agreement.

Were Schaefer's case a matter of deferral to arbitration, rather than a matter of deferral to a threshold settlement, Schaefer would now argue, as an added reason to grant the writ, that the court below "has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17-1-(c), The Supreme Court Rules—1980 Revisions. However, from the standpoint of formalism, the Schaefer majority below did not prohibit deferral to arbitration "in a way in conflict with" *Carey v. Westinghouse* and the *Steelworkers Trilogy*. From a practical standpoint, however, if an employer may settle a Section 7 case *only* with the Board's General Counsel (or Regional Director), then the employer will not want to arbitrate the dispute with the union. In this respect, the decision of the court below does serious damage to *Carey v. Westinghouse* and the *Steelworkers Trilogy*.

Therefore, this case clearly presents a question of great and continuing importance to labor-management relations in the United States.

CONCLUSION

There are particularly high stakes in this case:—*collective bargaining agreements* versus *Board monopoly*. A writ of certiorari should be granted.

Respectfully submitted,

JAMES B. HECHT
RICHARD V. SICA
KURT A. MILLER
Counsel for Petitioner

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7757

Dated: June 2, 1983

APPENDIX A

246 NLRB No. 29

D-5768
West Elizabeth, PA

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MICHAEL M. SCHAEFER,
AN INDIVIDUAL PROPRIETOR

and

Case 6-CA-11026

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 66, A, B, C, D
and R, AFL-CIO

DECISION AND ORDER

On April 25, 1979, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Admin-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

istrative Law Judge and to adopt his recommended Order,[2] as modified herein.[3]

Michael Kerfonta was among the five employees found by the Administrative Law Judge to have been unlawfully laid off or discharged in mid-December 1977,[4] following the election. The Administrative Law Judge, however, did not order the reinstatement of Kerfonta, finding that Respondent had subsequently recalled him at the end of February. For the reasons set forth below, we find that Respondent did not communicate an adequate offer of reinstatement to Kerfonta.

The sole testimony relative to an offer of reinstatement is by Kerfonta, who testified that he received a phone call on February 27 from Markle Everett, a nonsupervisory employee of Respondent. Everett asked Kerfonta if he would report for

[2]Although Member Penello dissented in *Community Medical Services of Clearfield, Inc., d/b/a Clear Haven Nursing Home*, 236 NLRB No. 102 (1978), cited in this case by the Administrative Law Judge, he finds that his opinion in that case is inapposite here.

[3]Although the Administrative Law Judge found that Respondent coercively interrogated employees in violation of Sec. 8(a)(1), he inadvertently failed to require Respondent to cease and desist therefrom; we shall modify his recommended Order accordingly.

In par. 1(f) of his recommended Order, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we shall modify the recommended Order so as to use the narrow injunctive language, "in any like or related manner."

The General Counsel has excepted to the Administrative Law Judge's failure to recommend that interest on backpay should be computed at the rate of 9 percent per annum. We find no merit in this contention. See *Florida Steel Corporation*, 231 NLRB 651 (1977).

[4]All dates herein are in December 1977, or in early 1978, unless otherwise indicated.

work the following day to help Everett change tires. Kerfonta responded that he could not return as he was starting a new job with another employer on February 28.

The Board has consistently held that communications by third parties do not constitute valid offers of reinstatement where there is no evidence that the employer authorized the third quarter to do so.[5] Based on an examination of Kerfonta's testimony, described *supra*, and the entire record, we are unable to find that Kerfonta could reasonably have assumed that Respondent had directed Everett to make an offer of reinstatement to him. Furthermore, it is also well established that a discriminatee, upon receiving an offer of reinstatement, has a fundamental right to a reasonable time to consider whether to return.[6] While we do not attempt to prescribe what is reasonable in every circumstance, we find that the time allotted by Respondent was totally inadequate. Here, Kerfonta would have had to inform Respondent of his intentions the same day that he received the phone call from Everett. Thus, contrary to the Administrative Law Judge, we conclude that Respondent did not make a valid offer of reinstatement to Everett.

As we have found that Michael Kerfonta was not given an adequate offer of reinstatement on February 27, 1978, we shall order that Respondent offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings that he may have suffered from the date of his layoff, December 16, 1977, until Respondent makes a valid offer of reinstatement to him.

---

[5] See e.g., *Royal Crown Bottling Company, Inc.*, 188 NLRB 352, 353 (1971).

[6] *William Dong, an Individual Proprietorship, d/b/a Woodland Supermarket*, 237 NLRB No. 151 (1978); *Penco Enterprises, Inc., Penco of Ohio, and Acoustical Contracting and Supply Corp.*, 216 NLRB 734, 735 (1975).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Michael M. Schaefer, an Individual Proprietor, West Elizabeth, Pennsylvania, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(f):

"(f) Coercively interrogating employees concerning their union and other protected activity."

2. Add the following as paragraph 1(g):

"(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the following for paragraph 2(a):

"(a) Offer Jeffrey Long and Michael Kerfonta immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Richard Bumgardner, Philip Drinkwater, Raymond Glesk, Jeffrey Long, Michael Kerfonta, and John Struniak whole for any loss of earnings they may have suffered due to the discrimination practiced against them, in the manner set forth in the section of this Decision entitled 'The Remedy.'"

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. October 22, 1979

. . . . . .
JOHN H. FANNING, *Chairman*

. . . . . .
JOHN A. PENELLO, *Member*

. . . . . .
JOHN C. TRUESDALE, *Member*

(SEAL) NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that I violated the National Labor Relations Act, as amended, and I have been ordered to post this notice. I intend to abide by the following:

I WILL NOT coercively interrogate employees concerning their union activities.

I WILL NOT aid or assist any labor organization in an election campaign.

I WILL NOT solicit employees to support a labor organization or interfere with their free choice in a Board-conducted election.

I WILL NOT promise economic benefits to employees in return for their support in a Board-conducted election.

I WILL NOT cause ineligible employees to vote in an election conducted by the National Labor Relations Board.

I WILL NOT discharge, lay off, or otherwise discriminate against employees because of their union activities.

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I WILL offer Jeffrey Long and Michael Kerfonta immediate and full reinstatement of their former jobs or, if

those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and I WILL make Richard Bumgardner, Michael Kerfonta, Philip Drinkwater, Raymond Glesk, Jeffrey Long and John Struniak whole for any loss of earnings they might have suffered due to the discrimination practiced against them, together with interest.

MICHAEL M. SCHAEFER,
An Individual Proprietor
(Employer)

Dated ..... By .....
(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

JD-217-79
West Elizabeth, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

MICHAEL M. SCHAEFER,
An Individual Proprietor

and

Case 6-CA-11026

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 66, A, B, C, D
AND R, AFL-CIO

Raymond R. Jacko, Esq.,
of Pittsburgh, Pennsylvania,
for the General Counsel.
James B. Hecht, Esq.,
(Thorp, Reed & Armstrong),
of Pittsburgh, Pennsylvania,
and *Michael P. Schaefer, Esq.*,
of Pittsburgh, Pennsylvania,
for Respondent.
Mr. Jack Dorrier,
of Monroeville, Pennsylvania,
for the Charging Party.

DECISION

Statement of the Case

GEORGE F. McINERNY, Administrative Law Judge: Upon a charge filed on March 6, 1978 by International Union of Operating Engineers, Local 66, A, B, C, D and R, AFL-

CIO, herein referred to as Local 66,[1] the Regional Director for the Sixth Region of the National Labor Relations Board, herein referred to as the Board, issued a Complaint on April 27, 1978, alleging that Michael M. Schaefer, an individual proprietor, herein referred to as Schaefer, or Respondent, had violated and was continuing to violate the National Labor Relations Act, herein referred to as the Act, by interrogating his employees concerning their union membership, activities and sympathies; by giving unlawful assistance and support to a labor organization other than Local 66;[2] by promising employees benefits to induce them to vote in an election conducted by the Board; and, by discharging or laying off certain of his employees because of their activities on behalf of Local 66.[3] Respondent has denied the commission of any unfair labor practices.

Pursuant to notice contained in the Complaint a hearing was held at Pittsburgh, Pennsylvania on October 3, 4 and 5, 1978,[4] at which all parties were represented, presented evidence, examined and cross-examined witnesses, and were given full opportunity to argue orally. Following the close of the hearing, the Respondent and the General Counsel filed briefs which have been carefully considered.[5]

---

[1]The charge was amended on April 11 and April 26, 1978.

[2]Laborers' International Union of North America, Local 1058, AFL-CIO, herein referred to as Laborers, or Local 1058.

[3]The Complaint was further amended at the hearing to allege a violation of Section 8(a)(5) of the Act.

[4]The General Counsel has moved to amend the transcript in a number of places. No objection to this motion has been received. Accordingly, noting that the reference to page 12, line 12 should be page 12, line 25, and with that revision, the motion is allowed.

[5]The time for filing briefs was extended to November 13, 1978. By that time both Respondent and the General Counsel had submitted briefs which, as noted, have been carefully considered. Under date of November 17, 1978, Respondent's Counsel submitted a document entitled "Respondent's Proposed Findings of Fact and Conclusions of Law" together with what is described as a "corrected" copy of Respondent's brief. Thereafter Counsel

(continued)

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

Michael M. Schaefer is an individual who maintains his principal office and place of business in West Elizabeth, Pennsylvania. Schaefer is engaged in several businesses, including the enterprise here in question which he operates under the name and style of Michael M. Schaefer, and through which he is engaged in the non-retail sale and distribution of slag and other materials. In the twelve-month period immediately preceding the issuance of the Complaint herein, Schaefer received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania for use at his West Elizabeth, Pennsylvania, facility. The Complaint alleges, the answer admits, and I find that Schaefer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The Complaint alleges, the answer admits, and I find that International Union of Operating Engineers, Local 66, A, B, C, D and R, AFL-CIO and Laborers' International Union of North America, Local 1058, AFL-CIO, are both labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

Schaefer owns and operates several businesses employing, roughly, 250 employees, of which only Michael M. Schaefer,

---

for the General Counsel moved to strike this document as untimely filed. I agree with the General Counsel, and the Motion to Strike is allowed. Rules and Regulations, Series 8, as amended, Section 102.114(b).

described above, and LeWinter Transfer Company, which is engaged in the transportation and disposal of slag from the Jones & Laughlin Steel Mills, are involved here. In the conduct of these operations, Schaefer has collective bargaining agreements with Operating Engineers, Local 66 covering three separate groups of employees, highway and heavy construction, shop employees, and yard employees. He also has had agreements for the last ten to twelve years with Laborers Local 1058 covering highway and heavy construction laborers, and for twenty years with a Teamsters local covering drivers for Michael M. Schaefer and LeWinter Transfer. The Teamster agreement covers 75 to 80 employees; the Operating Engineers agreements, 22 to 30; and the Laborers', 25 or 30 employees. Schaefer testified that he acted as his own principal spokesman in the negotiations for these several agreements.

At West Elizabeth, Respondent maintains a repair facility for the trucks used in his hauling operations from that location, which facility is the locus of the events in question here. It is evident from Respondent's own testimony that he viewed the repair operation as a training school for "young people off the street looking for jobs," a "romper room," where these young people, if they displayed "initiative and ability to watch and observe to do and better themselves" could become qualified mechanics. It appears then, that at the onset of the events which constitute this case Respondent did not consider this unit to be an important part of his overall organization, contrasted with his treatment of crane operators, described as irreplaceable, who were never laid off despite adverse business conditions, or even his truck drivers, who were assigned to short weeks or days instead of being laid off during slack periods.

B. The Union Activity

In mid-August of 1977, Richard T. Ward, a Business Agent for Local 66 received a telephone call from one of the

employees in Respondent's truck repair unit. In turn Ward set up a meeting on September 6 at a bar located on Route 51 south of Elizabeth. Employees Stevenson, Glesk and Kerfonta showed up but nothing more apparently was done at this time. A second meeting in the same place on September 12 produced more results. Stevenson, Glesk and Kerfonta were joined by two other employees, Berggren and Drinkwater, the Union was discussed and union authorization cards were passed out. Some cards were partially filled out at the meeting and there is some division in the testimony as to whether cards were signed at that meeting, or when Glesk passed out cards to other employees behind Respondent's building during lunch hour a few days later.

Regardless of these discrepancies, the cards were executed by employees Berggren, Glesk, Drinkwater, Kerfonta and Bumgardner. There was no further testimony concerning Stevenson. On October 25 the Union filed a representation petition in Case No. 6-RC-8012.[6] After the filing of the petition, Laborers' Local 1058 intervened, an agreement for a Consent Election was executed and an election was conducted on December 15 under the aegis of the Regional Director for the Sixth Region. The results of the election showed that out of ten eligible voters, six votes were cast for Local 66, three for Local 1058, none for no union, and no challenged ballots. The Tally of Ballots shows that Timothy Berggren acted as observer for Local 66, and Markle Everett acted as observer for Local 1058. No objections were filed and on December 23, Local 66 was certified by the Regional Director as the exclusive collective bargaining representative of all employees in a unit described as:

> "All mechanics, assistant mechanics and laborers employed by Michael M. Schaefer at its West Elizabeth,

[6] The facts as to the petition and its history up to the certification of Local 66 were stipulated by the parties.

Pennsylvania facility; excluding all other employees and guards, professional employees and supervisors as defined in the Act."

Following the meeting of September 12, Ward turned the matter over to another Local 66 Business Agent, Jack Dorrier, who apparently held at least one more meeting attended by Berggren, Everett and Drinkwater, on December 13.

C. Respondent's Pre-election Conduct

The first instances of alleged violation of law by Respondent occurred about two or three weeks after the employees had signed authorization cards for Local 66. While there are minor discrepancies in the descriptions of these incidents in the testimony of Berggren, Glesk, Drinkwater and Kerfonta, the substance is admitted by Schaefer in his testimony. My finding on these incidents is based on the accumulation of credible testimony of the named employee witnesses as well as the admissions by Respondent.

On that day, at quitting time, a number of employees were in the locker room changing their clothes before leaving work for the day. Michael Schaefer came out of his office and asked the employees whether they had signed cards for Local 66. At this point there are some differences in the testimony on how the employees answered, but it is clear that the answers were that they had signed cards. Schaefer asked where they had signed the cards, then went into his office and returned with some blank cards, not otherwise identified, and told the employees that if they wanted to sign cards they could sign those. Two of the employees said that they hurried to get dressed and get out of there, and no further conversation ensued.

In separate incidents, a conversation occurred at about this same time when Schaefer talked to employee Struniak in the garage and asked him if he had signed a card. On receiving

an affirmative answer, Schaefer asked him where he got the card, and Struniak said that he got it from a union man. At about the same time Schaefer asked employee Bumgardner if he had signed a card.

Some time after these incidents, Schaefer contacted Laborers Local 1058 and arranged for two representatives of that Local to come to the shop. Schaefer himself, or, in one instance the garage foreman, asked each employee in turn to go in and talk to the Laborers' representatives in the dispatcher's office. There, the two representatives talked to the employees about the advantages of representation by Local 1058. At least two employees, Berggren and Everett, lather attended a meeting sponsored by 1058 and signed authorization cards for that Local.

Schaefer further indicated his preference for Local 1058 over Local 66 in separate conversations with Berggren, Kerfonta, Drinkwater and Everett on the day before the election. Schaefer told Berggren that Local 1058 was the better union. He asked Drinkwater what he was going to do about the election and stated that Local 1058 would give the employees a pretty good deal and that they should go that way. He asked Kerfonta what union he was voting for. Kerfonta replied that he thought Local 1058 had better benefits but he wasn't sure which union he was going for. Everett testified that two days before the election Schaefer told him that his "best bet would be to go for 1058."[7]

On December 15, the day of the election, Respondent dispatched his admitted agent, Pete Soldo, a foreman for

[7]These findings are based on the credited testimony of Berggren, Kerfonta and Drinkwater, whom I found to be generally candid and credible witnesses. While I have less regard for Everett's general level of credibility, his testimony in this instance is generally corroborated by the other employees and is in accord with what I view as the inherent probabilities of the situation. I do not credit Schaefer's general denials for reasons which will be given below.

LeWinter Transfers, to round up a couple of votes. One of these, Richard Bumgardner, had quit Respondent's employ in November of 1977 for reasons unconnected with this case. Later Bumgardner came down to Respondent's premises to pick up his pay and was told by Schaefer that he would like to have him back, if Respondent needed him, and that Respondent would call if he was needed. The call came on the day of the election when Soldo picked Bumgardner up and brought him to the shop. There, Bumgardner had a conversation with Schaefer in which the latter asked him if he knew that "1058 is a good union." Bumgardner said yes, and then Schaefer said "you can come back to work tomorrow." Bumgardner agreed to this and Schaefer told him to go outside and then vote in the election.

Jeffrey Long, on the morning of the election, had not reported to work and had not called in. Instead he did some drinking, ending up at a place called Scotty's bar, where he was leveling off with some ginger ale and beer. Soldo traced him to Scotty's and told him it was voting day. Long replied that he had forgotten all about it. Soldo then asked him to come over to vote, adding that it might make Schaefer happy if he voted for Local 1058. Soldo added further that Berggren was going to sign up for Local 1058. Long then went over and voted for Local 1058.

D. The Struniak Layoff

As noted above, John Struniak had a conversation with Schaefer sometime late in September, 1977, concerning whether he had signed a card, where and from whom he got it.

Struniak had been hired as a mechanic in February of 1977. On December 6, 1977, Schaefer told him he was laid off, but not to look for another job. Struniak asked if Respondent went by seniority and Schaefer replied, yes. Nothing further was said in this conversation. Struniak was recalled by

Respondent on December 19, 1977. He continued to work for Respondent until May, 1978, when he found what he described as a better job and left voluntarily.

Schaefer testified that Struniak was laid off because he believed they were in the process of changing walking beams, an extremely difficult task, and Struniak had an aversion to that type of work. Schaefer did not, however, recall who was assigned to the walking beam job, nor what other types of work were available at the time.

E. The Post-Election Layoffs

Starting immediately after the election on December 15, 1977, Respondent instituted certain actions affecting his employees.

Richard Bumgardner, as noted above, had been brought into the shop for the election, and had been told to come back to work the next day. However Bumgardner had no telephone nor means of transportation, so was dependent for a ride to work on Paul Boyce, a weighmaster employed by another of Respondent's enterprises, Clairton Slag Company. Boyce had been accustomed to pick up Bumgardner in the morning and drive him to work, and, on the day of the election, drove him home. After dropping Bumgardner off and returning to his own home, Boyce received a call from Schaefer telling him not to bring Bumgardner in the next morning. Boyce then relayed the message to Bumgardner through one of the latter's relations. Late in January or early in February, 1978, Bumgardner had a conversation with Boyce as a result of which he returned to work for Respondent.

Respondent did not deny the conversation with Boyce in which Boyce was told not to pick up Bumgardner. Schaefer's explanation was that he had something else for Boyce to do. Respondent did not recall what this was, and, although he averred that this did not preclude Bumgardner from coming in

to work, offered no explanation as to why he did not recall Bumgardner until the next year.

Next, on the day after the election, Respondent called Glesk, Drinkwater and Kerfonta to the front of the garage about an hour before quitting time and told them he was laying them off due to "slack work" and the holidays, and that he would be calling them back after New Years or a few weeks later. He told them, in effect, to keep themselves available for his call. Notwithstanding this admonition, Glesk was not recalled until the end of March, 1978,[8] Drinkwater was recalled in April,[9] and Kerfonta at the end of February.[10]

Respondent's explanation for this layoff was that in the winter months there are times when the workload is limited. The business does not need so many trucks, and the work load was at a low ebb coming into the Christmas season. However, he could not recall whether he had ever laid off mechanics before and indicated he would have to look at his payrolls, which he did not do. He pointed to a shortage of anti-skid materials or salt to distribute to various municipalities that winter, but produced no trip records or other documentation which would verify this assertion. He also could not recall when first questioned whether any truck drivers were laid off during this slack period, but later stated that some drivers may have missed days or gone on short days, and, still later, suddenly recalled that seven or eight, or eight or ten, drivers had signed up for unemployment or had found other jobs, or quit. No payroll records or other documentation were produced to corroborate these statements.

Schaefer also went into some detail over the relative abilities of the employees who were laid off compared with those

---

[8]By which time he had obtained another job.

[9]He was still employed by Respondent at the time of the hearing.

[10]He also had secured other employment by the time he was recalled.

who were retained. It appeared from this testimony that Berggren and Drinkwater, at the time of the hearing, were qualified, by Schaefer's subjective standards, to become journeymen. Struniak, Glesk and Long were not comparable to Berggren, Bumgardner or Drinkwater. Then again Drinkwater's qualifications were equal, not superior, to Struniak's, but much superior to Kerfonta's and more than Everett's because Everett was a body and fender man.

If Schaefer's narrative concerning the relative qualifications of his employees seems to lack consistency or logic, the wage rates paid some of the employees would reinforce that impression. Drinkwater, who is described above as superior to, or at least equal to Struniak as a worker, received $3.25 at the time of his layoff, while Struniak received $4.00. Similarly, Glesk and Long described as "not comparable" to Drinkwater, received $3.50 each at the time they were laid off.[1]

Jeffrey Long was the last to be laid off. He had been employed by Respondent for about a year before December 18, 1977, as a janitor and clean-up man and also worked on trucks. He was not involved in union activity other than attending two meetings for Local 1058 at a tavern. He did not sign a card for either of the contending unions, but, as noted above, came in and voted at the election on December 15.

Respondent did not consider Long a particularly good employee (although paying him at a rate higher than Drinkwater or Kerfonta). Aside from his cavalier attitude on the day of the election when he neither went to work nor called in, but rather, in his own words, got "half drunk" but sobered enough to go to Scotty's bar, Long had had domestic trouble, police trouble, and ater being thrown out of his house, was given a place to stay over Respondent's office, whereupon he proceeded to flood the place.

---

[1]The rates for Berggren and Everett were not given in the record.

After the election, it is not clear that Long worked on Friday, December 16, but he was notified by Respondent's foreman to come in on the 18th or the 19th.[12]

After he had been at work for about two hours Schaefer told him he was laid off.[13] He was never recalled by Respondent.

Respondent's defense to the charge that this layoff violated the law was that Long was laid off for the same economic reasons as the others, but that, in addition, Long was not qualified to do the work, and had a spotty attendance record. Again, no time cards, payroll records or other documentation were produced to corroborate these statements, and Respondent at no time took the position that Long was fired, rather than laid off. Long's testimony of his final interview with Schaefer was that he was laid off. This was not denied by Schaefer and, despite some other problems I had with Long's testimony, I credit this statement.

F. The Discharge of Berggren

Timothy Berggren was employed by Respondent in1974 and by the time of the events here being considered was classified as a mechanic. Berggren was one of the first adherents of Local 66 in the shop, although he later hedged his bets by signing an authorization card for Local 1058, but such divided loyalties did not prevent him from acting as the observer for Local 66 at the December 15 election, and, after the election serving as shop steward and an employee member of the Local 66 negotiating committee.

---

[12]Long testified that he came in on the 18th, but that was a Sunday. I think it is more logical to assume that he was talking about Monday, the 19th, particularly since Long quoted Schaefer as saying that Struniak was back to work, and Struniak did not return until the 19th.

[13]Long testified about additional conversation with Schaefer at that time, but his testimony was not sufficiently coherent to be credited.

From the testimony of Respondent Michael M. Schaefer, his officer manager, John Sangel, and Jack Dorrier, the Union's Business Representative, and from Berggren, it is evident that there were a number of negotiating sessions between Respondent and the Union in the weeks and months between the Union's certification on December 23, 1977 and February 24, 1978. There is no indication in the record that these meetings were marked by the acrimony and bad feeling which so often characterizes this part of the collective bargaining process.

Then, on February 22, while Berggren was working on a truck, he got a piece of steel in his eye. He did not report it to management and it apparently did not bother him until after he had arrived home after work. The eye then began to bother him so he went to a local hospital where he received emergency treatment and made an appointment to visit an eye specialist the next morning.

Early on the morning of February 23, Tim Berggren's mother, Mrs. Nellie Berggren, called Respondent's office, spoke to the dispatcher, and informed him that Tim would not be in that day. She apparently had called in the same manner three or four times in the past year. However, on this occasion, Michael Schaefer called that evening and asked for Tim Berggren. Tim was upstairs in bed and Mrs. Berggren answered this call.[14] Schaefer asked for Tim and Mrs. Berggren, thinking it was one of Tim's friends, said that he was not there. Schaefer then identified himself and Mrs. Berggren said that Tim was there and that he could speak to him. Schaefer said no, to let him alone, but requested that he be in Schaeffer's office at seven the next morning. Schaefer then went on to say that he didn't know what was happening there (at the shop) and

[14]The substance of this and the other telephone conversations which took place that evening is taken from the credited undenied testimony of Nellie and Caleb Berggren. Schaefer did not testify concerning the conversations.

that everyone was "falling out" and no one was talking to anyone.[15] Mrs. Berggren said that she didn't know anything about that.

At this point, the tone of the conversation changed. Schaefer told Mrs. Berggren that he didn't want her calling the shop anymore. Mrs. Berggren took issue with this, pointing out that all she did was to call in for Tim, as he had asked her. Schaefer then said that if she called to report Tim off she should do so before seven. She replied that she had called at 6:57 a.m. Schaefer said that he didn't want any more of these telephone calls, and then went on to berate her, saying that "you god-damned people are all alike. You sit in your warm, comfortable homes, and then you sit on your asses and you eat your nice warm meals and I'm over here trying to run a business." Mrs. Berggren said she couldn't help it about his business, and slammed down the receiver. Then, unsatisfied that the matter should rest there, Mrs. Berggren called Schaefer and told him that he was very rude to her and that he had no right calling her home. Schaefer replied that she was rude to him and she had no right calling him at his office. He repeated that he did not want any more of these telephone calls. She retorted that she had every right to call him when he had talked to her like that. He said that her calls would not be accepted anymore. She responded that he was "very ignorant" and again slammed down the receiver.

Mrs. Berggren then went to get ready to go out for an evening of bingo when the telephone rang again. This time Tim's father, Caleb Berggren answered. It was, of course, Schaefer, who first asked who had answered then asked "where is that son-of-a-bitch?" Mr. Berggren replied "You are an ignorant son-of-a-bitch," then hung up.

---

[15]It is not clear whether this had reference to the negotiations or to the Union. There is no further amplification on the record.

The last act of this drama occurred when Mrs. Berggren was informed of this conversation, again picked up the telephone, called Schaefer, informed him that he had no right to call her a son-of-a-bitch, and for the last time, hung up.

On the next morning Tim Berggren reported to work at seven o'clock. He waited as directed in Respondent's office when Schaefer came in. He told Berggren that he could not stand the harassment from Berggren's parents and would have to discharge him.[16] Berggren said all right, picked up his tools and left.

The discharge was then discussed at a meeting between Schaefer and Dorrier on February 27. It was agreed at that time that Berggren would be reinstated. The question of back pay for the two days Berggren missed work was apparently not resolved at this meeting. Schaefer testified that the issue of back pay did not come up. Dorrier stated that Schaefer refused to agree to back pay. For reasons which are discussed below I do not credit Dorrier's version of this incident,[17] and find that the question of back pay did not, in fact, arise.

G. The Strike Incidents

The meeting of February 27, at which the discharge of Berggren was discussed, was also, apparently, a bargaining session which did not work out to the Union's satisfaction. After the meeting ended the Union resolved to strike. The strike began on the 28th at seven or seven-thirty in the morning.

During the strike, which lasted for two and a half weeks, Berggren and Drinkwater participated in the picketing of Respondent's facility during most days from 5:30 or 6:00 a.m.

---

[16]I do not believe that Berggren was suspended as implied in Schaefer's answers to questions from his counsel. It is clear that he was discharged.

[17]Nor do I credit Dorrier's statement that Schaefer said at this meeting that Berggren was fired for not showing up for work and not reporting off.

to 6:00 p.m. Bumgardner and Everett also participated in the picketing as well as other unidentified pickets who are apparently assigned from the Local 66 headquarters, referred to as the "hall." In the first few days of the strike there were several incidents involving the pushing of railroad ties onto the access road leading to Respondent's premises while trucks were passing, and on several occasions, nails were strewn on this road. None of the employee witnesses admitted that they had participated in these activities, blaming the incidents on the "guys from the hall," and no evidence was introduced by Respondent to show that the employees were in fact implicated. However, there were two incidents in which employees did participate and which gave rise to responses by Respondent.

The first of these in point of time happened on the third day of the strike.[18] Markle Everett and Philip Drinkwater were standing on the access road to block the egress of one of Respondent's trucks. They had succeeded in stopping the truck, when Schaefer himself came up to them, tapped them on their shoulders and asked them to get off the road. They did not, but moved away from Schaefer, remaining in the road. Schaefer then came up to them, at which time Drinkwater moved off to the side. Everett kept walking, on the road, whereupon Schaefer grabbed him and threw him to the side of the road. Everett returned to the road and Schaefer went after him again, pushing him off the road again, and, at this point, pushed his jacket back with one hand. Drinkwater saw this gesture but could not see exactly what Schaefer was doing. Everett testified that when Schaefer pushed his jacket back, it revealed a gun tucked into his belt. According to Everett Schaefer put his hand on the gun and called on Everett to come back up on the road.

---

[18]There is some confusion about the exact time of this and the other incident. However, Respondent's Counsel indicated on the record that some sort of court order was obtained against unlawful strike activities so I can assume that all of these incidents occurred in the first few days. The exact time is not really significant in any event.

I have some problems here with Everett's version of the story, primarily because I did not find that Everett was, on the whole, a credible witness. For example, he testified at one point that he had signed a card for Local 66, and immediately thereafter, denied that he had signed a card for Local 66. He admitted that he had signed a card for Local 1058, and remembered sitting at the table at the election checking the names when the ballots were handed out, but did not remember which party in the election he was working for. Further, while Drinkwater testified as to Schaefer's gesture in pushing back his jacket, he did not corroborate Everett's story as to what Schaefer said. For these reasons I do not credit Everett's story about the gun, although I do credit so much of his testimony on this incident as is corroborated by Drinkwater.

The second incident occurred later in the same day. The strikers had acquired a number of cardboard drums described as about three feet high and one foot in diameter from the employees in a plant next door. The strikers were using these drums, along with old railroad ties, as fuel for a fire they had built to warm themselves. A number of the drums were stacked by the side of the access road for this use. The incident happened when another truck began to leave Schaefer's property. Drinkwater felt it was wrong for that truck to be coming out of the yard while he and the others were on strike. So he seized one of the cardboard drums and threw it at the truck, with such force that it passed entirely over the front of the truck and didn't hit anything. About five minutes later Schaefer drove out of the yard in his car and hit the cardboard drums which were stacked beside the gate. He then got out of the car and went to where Drinkwater was standing. He proceeded to bump Drinkwater with his stomach repeatedly, calling him a "yellow belly" and "bastard" and finally spit in Drinkwater's face before he was restrained by the dispatcher and Schaefer's son, Paul. Drinkwater's credible testimony was corroborated, except for the spitting incident, by Berggren and was not

denied by Schaefer. I thus credit the version of the incident as reported here.

H. The 8(a)(5) Allegations

Toward the close of the hearing, the General Counsel moved to amend the Complaint to charge that Respondent further violated the law in that he allegedly conditioned the execution of a collective bargaining agreement upn the withdrawal of the instant charges by the Union. Over Respondent's objection I allowed the motion to amend.

This amendment was prompted by Schaefer's testimony, on cross-examination, which, the General Counsel avers, shows that he conditioned the execution of the agreement on the withdrawal of the charges. Respondent in his answer to the Complaint did not come right out and say that he had conditioned the agreement on the withdrawal of the charges, but did state, and repeated throughout the hearing, that the Union's agreement to withdraw the charges was part of a "comprehensive collective-bargaining agreement" between the parties.

Three of the participants in the negotiations testified on this aspect of the case.

John Sangel, Respondent's office manager, stated that Schaefer brought up the subject at one meeting, asking if the charges would be dropped. According to Sangel, Berggren and Dorrier agreed that they would be dropped. At one of the final meetings, the subject was again raised, but Sangel was positive that Schaefer never insisted that the charges be dropped as a condition of agreement. Sangel impressed me as a credible and reliable witness and I credit his testimony.

Michael Schaefer testified that the subject of withdrawal of the charges came up during negotiations and that he was the one who brought it up. He testified that he consulted with his

attorney[19] on the subject and was advised to ask that the charges be dropped in the interest of making the relations between the parties "neat and clean" and "to have a good relationship with everyone." Schaefer's recollection was that he asked that the charges be dropped, and that the Union representatives (presumably Dorrier and Berggren) agreed. At no point did his testimony indicate that he demanded or insisted that the charges be dropped on a condition to his agreement to the collective bargaining agreement. While I have some problems with Schaefer's credibility, particularly on the issue of his bias toward Local 1058, in this instance his testimony is substantially corroborated by Sangel and I believe that things happened pretty much as he described them.

Jack Dorrier was recalled by the General Counsel after the amendment to the Complaint was allowed, but stated that he did not remember Schaefer asking whether the charges were to be withdrawn. This statement I find to be patently untruthful and as a result I find all of Dorrier's testimony unless corroborated by others, or unimportant to the issues of this case, to be less than credible.

Berggren, the other witness who was present at the negotiating sessions was not called upon to testify on this matter. While I do not form any adverse inference from this failure, it follows that Dorrier's statement is uncorroborated, and, as noted above, not credited.

I. Analysis and Conclusions

There is no question about the interrogation of employees by Respondent in the period identified in the testimony as being two to three weeks after the employees had signed cards for Local 66 in mid-September, 1977. The credible testimony of employees Berggren, Glesk, Drinkwater and Kerfonta concerning the first incident, which occurred in the locker room, is

[19]Michael P. Schaefer, Respondent's son and co-counsel in this case.

admitted by Schaefer. His stated reason for engaging in this conduct was that everyone else knew what was going on and he was curious about the extent of the union activity. Schaefer likewise did not deny the credited testimony of Struniak and Bumgardner that he questioned them individually later on concerning whether they had signed cards, and, in Struniak's case, who had given him the card.

By engaging in this activity, merely out of curiosity and not for the purposes or under the safeguards prescribed in *Struknes Construction Co.*, 165 NLRB 1062 (1967), Respondent has violated Section 8(a)(1) of the Act. *Vegas Village Shopping Corp.*, 229 NLRB 279 (1977).

In addition to these instances of interrogation, the credible evidence of Berggren, Everett, Kerfonta and Drinkwater shows that on the day before the election Respondent asked these employees what they were going to do about the election or which union they were going to vote for. Respondent's general denials, broadly exculpatory in nature and elicited by generalized and leading questions, are not credited as to these two incidents. Thus I find these two incidents of interrogation to be violations of Section 8(a)(1). *Winter Garden, Inc.*, 235 NLRB No. 4 (1978).

While the evidence in this case does not reflect the anti-union hostility, or animus, present so often in cases of this type, an analysis of the evidence shows a clear slant, or bias, in favor of Local 1058, even though the same evidence shows no outward manifestation of resentment, enmity or hostility toward Local 66.

The entrance of Local 1058 on the scene followed the interrogation of the employees, and was the result of an invitation by Schaefer, admitted by him, to send two representatives to Schaefer's premises to talk to employees. There representatives appeared and employees were dispatched in to see them

by direction of Respondent or his agent. While Schaefer said that business representatives from any union have access to these facilities, he did not say that this sort of courtesy was extended in the context of an election campaign, nor, in such context, extended to both of the contending unions. There was no evidence that the same courtesy was extended to representatives of Local 66.

Further evidence of Respondent's bias appears in the credited testimony of Berggren, Kerfonta, Drinkwater and Everett concerning interviews which took place the day before the election and in the interview between Schaefer and Bumgardner on the day of the election where Schaefer had sent Pete Soldo out to Bumgardner's residence to bring in this former employee to vote. The same firm but subtle influence is shown in the credited testimony of Long concerning his conversation with Soldo on the morning of the election. Soldo was not called as a witness and the statement stands undenied. These interviews, albeit low-keyed, showed Respondent's bias toward Local 1058, and his continuing pressure on the employees to follow his choice.

It therefore follows that Respondent, by exercising his prestige and authority on the side of one of the unions which were competing for the votes of his employees has interfered with, restrained and coerced these employees in violation of Section 8(a)(1) of the Act. *Schlabach Coal Company*, 231 NLRB 1322 (1978); *Shorewood Manor Nursing Home*, 217 NLRB 331, (1975).

The interview between Schaefer and Bumgardner on the day of the election also contained what the General Counsel claims is an unlawful promise of benefit to Bumgardner. The latter had voluntarily quit in November, and had been told by Respondent that he would be called if needed. He was needed on the day of the election and the conversation between the two makes it clear that Schaefer, having first indicated his prefer-

ence in the election,[20] then asked him if he would like to come back to work. Bumgardner agreed, and then went in to vote. I conclude and find that the offer to return to work, constituted an attempt to influence the outcome of the election in violation of Section 8(a)(1) of the Act. *Piccadilly Cafeterias, Inc.*, 231 NLRB 1302 (1977).

Additionally, by calling in a person who was no longer an employee and sending him in to vote in a Board conducted election in an attempt to influence that election constitutes a fraud on the Board's election process and, I find, a separate violation of Section 8(a)(1) of the Act. *Westpoint Transfer Inc.*, 222 NLRB 345 (1976).

In evaluating the layoffs and discharges of various employees herein I have taken as a starting point Respondent's expressions of favor for Local 1058. Since I have found that a number of statements were made in favor of Local 1058 by Respondent to a number of employees in the period prior to the election it is fair to assume that Respondent preferred that Union over Local 66. His motivation for this preference, I infer and find, must be based upon his experience, as he stated in his testimony, in dealing with both unions over a period of years. It is not, then, illogical to infer and find, as I do, that Respondent perceived that the employees' affiliation with Local 1058 would be in his economic best interest. Concomitantly, this perception would lead to disaffection, or animus, even if not expressed in a hostile or overtly antithetical manner, toward Local 66 and his employees' preference for that organization as expressed by their vote in the election.

A second preliminary consideration is the disrespect, even contempt, which Respondent displayed for this bargaining unit and the employees who worked in his repair facility. It is

[20] I view Schaefer's question, "Do you know 1058 is a good union?" as rhetorical, conveying to Bumgardner Schaefer's own opinion, rather than soliciting a response.

clear from Respondent's reference to the unit as a "romper room," and his testimony about a training school for "young people off the street" not only that he did not view this unit as important to his overall operation, but also that he felt he was justified in running it as a low wage, low budget operation.

Given this view of the operation by Respondent, and his comparative expererience with the two unions involved, I infer and find, first, that Respondent's preference for and bias in favor of Local 1058 was the result of his determination that affiliation with Local 1058 would cost him less; and, second, that the vote of the employees on December 15 to affiliate with Local 66 led to Respondent's decision to decimate the bargaining unit in order to avoid higher costs in an operation which he considered, at best, marginal.[21]

Thus Respondent's instructions to Boyce, on the afternoon of December 15, not to pick up Bumgardner the next day;[22] his layoff of Glesk, Drinkwater and Kerfonta on December 16; and the layoff[23] of Long on Decmber 19, are all parts of a unified effort by Respondent to eliminate employees and thereby minimize the economic effect of the respresentation of his employees by Local 66. The inescapable effect of these actions, taken for economic reasons, but in retaliation for, or as a reaction to, the results of the election, is to discourage union membership and activity in general and is not necessarily directed at the activities of particular individuals.

---

[21]This is borne out by a comparison between the wages paid to the employees prior to the election and the wage and fringe benefit package actually negotiated between Local 66 and Respondent which is in evidence and which shows a substantial economic impact.

[22]It is not essential to this decision to decide whether this was a discharge or a layoff, since the remedy is the same in either case.

[23]Again, it is not essential to determine whether Long was laid off, as he said, or discharged, as Respondent testified, since the remedy in either case is the same.

Here there was some union activity by Glesk and Drinkwater. Kerfonta and Bumgardner signed cards, but Long had expressed no preference, had attended only one meeting for Local 1058, and indicated that he would rather have remained in Scotty's bar rather than going to vote in the election. Respondent's treatment of these employees was not, in my opinion, due to their activities or lack of activity, but was directed at all the employees because of their expressed preference for Local 66. *Rock Tenn Company, Corrugated Division*, 234 NLRB No. 126 (1978); *Arnoldware, Inc.*, 129 NLRB 228 (1960); *Webber American, Inc.*, 194 NLRB 692 (1971). See also *Quintree Distributors, Inc.*, 198 NLRB No. 69 (1972); *M.S.P. Industries, Inc., d/b/a The Larimer Press*, 222 NLRB No. 29 (1976).

Respondent's economic defense, based on a general slackening of work and inability to obtain "anti-skid" material does not hold up. No evidence was proferred that would show similar treatment of employees in other years for similar reasons. The evidence which Respondent did submit is solely based on the testimony of Michael M. Schaefer, totally unsupported by any documents, as noted above, which surely must have been in the possession of Respondent. *Maximum Precision Metal Products*, 236 NLRB No. 179 (1978).[24] Further, I do not credit Schaefer's testimony on the economic reasons for the layoff. His responses to questions both on direct and cross examination were evasive and general in scope, avoiding the kind of specificity which he must have himself undertaken before implementing a layoff, and which I fell is necessary in order to justify such a layoff at that time.

---

[24]The vulnerability of this defense is also demonstrated by the fact that, even at the time of the hearing, Respondent continued to function with only three employees where he had previously had ten. Part of this is explained by the increase in subcontracting to Bill's Truck Repair, as noted by the General Counsel, and another part, as noted above, by the increased wages and benefits included in the Local 66 contract.

Thus I find the layoffs of Bumgardner, Glesk, Kerfonta, Drinkwater and Long to be in retaliation for their participation in the election on December 15 which turned out contrary to Respondent's expressed desires.

In my opinion, the layoff of John Struniak on December 6 fits the Respondent's pattern of low-keyed, but firm and persistent favor toward Local 1058, and disfavor toward Local 66. The evidence shows that Stuniak, like a number of others, was questioned by Schaefer and admitted that he signed a card for Local 66 which had been given to him by someone from the Union (Local 66). The evidence does not, however, show that Struniak was involved in union activity any more than that. He certainly was not as involved so deeply as Berggren or Glesk. Other than the absence of union acitivity on the part of Struniak, the only difference between him and the other employees was that he appeared to me to be somewhat older than the rest.

It would appear from this, and in the absence of overt manifestations of hostility by Respondent, that the motive behind Struniak's layoff must be explored further. Respondent himself stated that he believed that they were in the process of changing walking beams, an extremely difficult task, and that Struniak had an "aversion" to that type of work. At another point in his testimony Respondent described Struniak as "not comparable" in ability to Berggren, Bumgardner and Drinkwater, but, then, stated that Struniak and Drinkwater were "equal" in qualifications. It is evident from these contradicting statements, and from respondent's broad and generalized comments about the relative abilities of his employees, that I can place little credence in these evaluations. It follows that I do not credit Respondent's stated reason for the layoff of Struniak on December 6. Indeed, Struniak's recall on December 18, in the face of what I have found to be Respondent's intention to limit his potential economic liability by the layoff of the other employees, would also contradict the reasons advanced for the layoff of Struniak.

As I do not credit Respondent's stated reason for this action, I infer and find that the real reason for Struniak's layoff at a critical point in the pre-election period was in furtherance of Respondent's efforts to influence his employees to vote for the union of his choice, Local 1058. Struniak, like the others, had made no secret of his preference in the upcoming election. The others were also aware of Respondent's bias in favor of Local 1058, and were aware of Struniak's feelings. Thus Respondent's action would naturally have a tendency to restrain and coerce his employees in their free choice of a bargaining representative.

The discharge of Berggren on February 24, 1978, is another matter. There is no question of the extent of Berggren's union activities, or that from the time of the election onward, he was, as shop steward and a member of the negotiating committee, Local 66's most visible adherent. As such, any adverse action taken against him must be analyzed very carefully. I have fully reported the telephone conversations between Schaefer and Nellie and Caleb Berggren on the evening of February 23, since the alleged harassment contained in these telephone conversations is the reason which Schaefer gave to Berggren on the morning of the 24th as the reason for his discharge.[25] In reviewing the conversations, and leaving aside the farcical element to the whole encounter, it is clear that the whole thing began as the result of Schaefer's rude behavior in the first conversation, even allowing for his admitted overwrought state that evening. However, Mrs. Berggren chose to exacerbate the situation by slamming down the telephone, and then, not leaving well enough alone, called him back to berate him for his churlishness. The ensuing calls were a natural and understandable result, leaving Mrs. Berggren, as is appropriate, with the last word. It thus appears to me that aside from

[25]As noted above, I do not credit Dorrier's testimony that Schaefer told him Berggren was discharged for not coming to work and not reporting off sick.

the fact that Schaefer's attitude began the affair, it became a verbal joust and ended with mutual name calling. In these circumstances I find that Schaefer discharged Berggren because of his anger over these telephone conversations, as he stated to Berggren the next morning, and that the General Counsel has not shown by a preponderance of the credible evidence that the reason was Berggren's union activity.

Following the discharge and later reinstatement of Berggren, the employees began the strike which lasted about two and a half weeks and ended with the execution of the collective bargaining agreement between Local 66 and Respondent. About three days into the strike two incidents occurred which gave rise to allegations by the General Counsel that Respondent further violated the Act.

The first of these took place when employees Everett and Drinkwater had blocked the egress from Respondent's shop by standing in the middle of the road. The evidence shows that Schaefer came up to them, and asked them to get off the road. On their refusal, Schaefer "threw" Everett off the road, and when the latter returned to the road, threw him off again. This time he remained off, and the incident ended.[26]

The second incident occurred later that day, after Drinkwater had thrown a cardboard drum at one of Respondent's trucks. In this incident it is true that Respondent drove his car into a number of cardboard drums stacked near the picket line, but there is no evidence that the pickets themselves were in danger, or felt that they were in danger from the car. Schaefer then jumped out of the car, pushed Drinkwater around, called him names and spat in his face.

Both incidents occurred at a time when railroad ties had been pushed under the wheels of vehicles leaving Respondent's

[26] As noted above, I do not credit Everett's statement that Schaefer, after the second shove, put his hand on a gun and, in effect, dared Everett to come back up onto the road.

premises and nails had been strewn on the roadway. It may be true that the incidents involving the nails and the railroad ties may have been the work of the people from the Local 66 hall who were assisting the employees in their strike, but it is also true that the incidents did occur, and that Respondent's actions in assaulting Everett and Drinkwater were his response to the physical blocking of the road in the first incident, and the throwing of the drum in the second.

Thus I find that Respondent's actions in both the Everett and Drinkwater cases constituted retaliation for activities by both employees which, while they may not have been so serious as to warrant denial of reinstatement, were, nonetheless not protected by the Act. Further, the retaliatory response by Respondent, while certainly not condoned, was not excessive in view of the degree of provocation. *Stark Ceramics, Inc.*, 155 NLRB 1258 (1965); *Cabot Corporation*, 223 NLRB 1388 (1976); *Cosmo Graphics*, 217 NLRB 1061 (1975).

Finally we come to consideration of the General Counsel's amendment to the Complaint made toward the close of the hearing and alleging unlawful refusal to bargain in good faith by Respondent. The theory underlying General Counsel's allegation is that Respondent conditioned the parties' collective bargaining agreement on a promise by Local 66 to withdraw the charges which form the basis for the instant case. While Respondent's position as set out in his answer and his brief does not precisely coincide with the General Counsel's, he does maintain that an agreement was made between himself and Local 66 that in consideration of the concessions made by Respondent during negotiations, Local 66 agreed that the charges would be withdrawn.

The evidence does not show, however, that Respondent at any time insisted upon withdrawal of the charges as a condition to his agreement to the terms of the contract. Since this is so, the cases submitted by the General Counsel, while they support

the position that an employer violates Section 8(a)(5) by conditioning execution of a collective bargaining agreement on the withdrawal of charges, are inapplicable to the situation here.

Notwithstanding this finding, Respondent maintains as a defense to this entire proceeding an alleged agreement by Local 66 to withdraw the charges herein. Apparently something of the sort was agreed to by Local 66, but in the circumstances, I do not need to make such a finding because, assuming, *arguendo*, that such a commitment was made, that sort of agreement does not detract from the power of the Board to exercise its "lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Such discretion to dismiss charges will be exercised only when the unfair labor practices are substantially remedied and when, in the Board's considered judgment, such dismissal would effectuate the policies of the Act." *Robinson Freight Lines*, 117 NLRB 1483 (1957); *The Ingalls Steel Construction Company*, 126 NLRB 584 (1960); *Community Medical Services of Clearfield, Inc. d/b/a Clear Haven Nursing Home*, 236 NLRB No. 102 (1978). In this case the alleged agreement to withdraw the charges would have provided no remedy at all for the persons found here to have been discriminatorily laid off. Thus, Dorrier and Berggren, in their representative capacity at the bargaining table could not bind the Regional Director, nor the Board, from proceeding in this manner to effectuate the policies of the Act.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend he be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent laid off John Struniak, Raymond Glesk, Philip Drinkwater and Michael Kerfonta,

and laid off or discharged Richard Bumgardner and Jeffrey Long, in violation of Section 8(a)(1) of the Act, I recommend that Respondent be ordered to offer reinstatement to Long, and to make all of these employees whole for any loss of earnings and other benefits resulting from their layoffs or discharges by payment to them of a sum of money equal to the amount they normally would have earned as wages and other benefits from the dates of their layoffs or discharges to the date on which reinstatement is or was offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1959), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[27]

[27]See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). The General Counsel requested that I recommend to the Board that it adopt a remedial interest rate of 9% per annum. Since the Board has not yet ruled on this issue I deem it inappropriate to make such a recommendation at this time.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 66 and Local 1058 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees concerning their union and other protected activities.

(b) Assisting and aiding Local 1058 in the course of an election campaign.

(c) Soliciting employees to support Local 1058 and interfering with their free choice in a Board-conducted election.

(d) Promising economic benefits to an employee in return for support of Local 1058.

(e) Causing an ineligible employee to vote in a Board-conducted election.

4. Respondent violated Section 8(a)(3) of the Act by laying off John Struniak, Raymond Glesk, Philip Drinkwater and Michael Kerfonta, and by laying off or discharging Richard Bumgardner and Jeffrey Long because of their union activities.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing finding of fact, conclusion of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended [recommendations]:[28]

---

[28]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Michael M. Schaefer, his heirs, administrators, agents, successors and assigns shall:

1. Cease and desist from:

(a) Assisting and aiding any labor organization in the course of an election campaign.

(b) Soliciting employees to support a labor organization and interfering with their free choice in a Board-conducted election.

(c) Promising economic benefits to an employee in return for support of a labor organization in a Board-conducted election.

(d) Causing an ineligible employee to vote in a Board-conducted election.

(e) Discharging, laying off or otherwise discriminating against employees because of their union activities.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Jeffrey Long immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make Long, Struniak, Glesk, Drinkwater, Kerfonta and Bumgardner whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at his West Elizabeth, Pennsylvania plant, copies of the attached notice marked "Appendix."[29] Copies of said notice on forms provided by the Regional Director for Region 6, after being duly signed by his authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps he has taken to comply herewith.

Dated, Washington, D.C. April 25, 1979

.....

GEORGE F. MCINERNY
Administrative Law Judge

---

[29]In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX JD-217-79

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial at which both sides had the opportunity to present their evidence, an Administrative Law Judge of the National Labor Relations Board has found that I violated the National Labor Relations Act and I have been ordered to post this notice.

I WILL NOT coercively interrogate employees concerning union activities.

I WILL NOT aid or assist any labor organization in an election campaign.

I WILL NOT solicit employees to support a labor organization or interfere with their free choice in a Board-conducted election.

I WILL NOT promise economic benefits to employees in return for their support in a Board-conducted election.

I WILL NOT cause ineligible employees to vote in a Board-conducted election.

I WILL NOT in any other manner interfere with, restrain or coerce my employees in the exercise of rights guaranteed them by Section 7 of the Act.

I WILL NOT discharge or otherwise discriminate against any employee because of that employee's union sympathies.

I WILL offer full reinstatement to Jeffrey Long with backpay plus interest, and I WILL pay full backpay plus

interest to John Struniak, Raymond Olesk, Philip Drinkwater, Michael Kerfonta, and Richard Bumgardner, on account of the discrimination suffered by them.

MICHAEL M. SCHAEFER,
An Individual
Proprietor

(Employer)

Dated_____ By _____
(Representative) *(Title)*

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building - 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219 (Tel. No. [412] 644 2973).

APPENDIX B

261 NLRB No. 42

D-8727
West Elizabeth, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

MICHAEL M. SCHAEFER,
AN INDIVIDUAL PROPRIETOR
and
INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 66, A, B, C, D
AND R, AFL-CIO

Case 6-CA-11026

SUPPLEMENTAL DECISION AND ORDER

On October 22, 1979, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding[1] finding, *inter alia*, that Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily laying off or discharging employees Richard Bumgardner, Philip Drinkwater, Raymond Glesk, Michael Kerfonta, Jeffrey Long, and John Struniak. The Board ordered that Respondent reinstate Kerfonta and Long[2] and make whole all the discriminatees for any loss of earnings suffered by reason of the discrimination against them.

Thereafter, the Acting Regional Director for Region 6 issued and served on the parties a backpay specification and

[1]246 NLRB 181. Chairman Van de Water and Member Hunter note that they were not on the Board at the time the initial Decision and Order issued and that their participation at this stage of the proceedings is for institutional reasons.

[2]Respondent previously had recalled the other discriminatees.

notice of hearing on June 4, 1980.[3] Respondent subsequently filed an answer on June 26, in which it denied certain allegations of the specification. On October 20 and 21, a hearing was held before Administrative Law Judge Robert Cohn for the purpose of determining the amounts of money due under the backpay specification. On August 21, 1981, Administrative Law Judge Cohn issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[4] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[5]

---

[3]All dates are in 1980, unless otherwise indicated.

[4]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[5]The Administrative Law Judge found, and we agree, that the backpay specification sets forth the proper amount of backpay owed to the discriminatees. In his recommended Order, however, the Administrative Law Judge directed that such amounts should be diminished by any payments that Respondent made to certain discriminatees as part of the purported informal settlement agreement entered into before the backpay hearing herein. We find merit in the General Counsel's limited exceptions to this recommendation since a review of the backpay specification discloses that the computations already reflect deductions of the amounts previously paid by

(continued)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Michael M. Schaefer, an Individual Proprietor, West Elizabeth, Pennsylvania, his agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. April 22, 1982

. . . . . .

JOHN R. VAN DE WATER,
Chairman

. . . . . .

JOHN H. FANNING,
Member

. . . . . .

ROBERT P. HUNTER,
Member

(SEAL) NATIONAL LABOR
RELATIONS BOARD

Respondent. Accordingly, we find that the sums set forth in the backpay specification and in the Administrative Law Judge's recommended Order are correct as stated.

Chairman Van de Water joins in affirming the Administrative Law Judge in striking a portion of Respondent's answer for lack of specificity because no other matters of fact were in dispute and Respondent has had a hearing herein.

JD-410-81
West Elizabeth, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

MICHAEL M. SCHAEFER,
An Individual Proprietor
and
INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 66, A, B, C, D
and R, AFL-CIO

Case 6-CA-11026

Sandra Beck Levine, Esq.,
for the General Counsel.
James B. Hecht, Esq.
(Thorp, Reed & Armstrong),
Pittsburgh, PA, for the Respondent.
Mr. Jack Dorrier, Monroeville, PA,
for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

ROBERT COHN, Administrative Law Judge: On October 22, 1979, the National Labor Relations Board issued its Decision and Order in the above-captioned proceedings.[1] The Board ordered, *inter alia*, that the Respondent make whole six named employees for any loss of earnings they may have suffered due to the discrimination practiced against them.[2] The record herein reflects that, initially, the Respondent

[1] 246 NLRB No. 29.

[2] The named employees are: Richard G. Bumgardner, Philip Drinkwater, Raymond A. Glesk, Jeffrey L. Long, Michael R. Kerfonta, and John G. Struniak.

and Board representatives were unable to agree upon the amount of backpay due the six discriminatees. Whereupon, on June 4, 1980, the acting Regional Director for Region 6 of the Board, issued a Backpay Specification and Notice of Hearing in the matter. Having received an Order Extending Time for Filing Answer, Respondent, on June 26, 1980, duly filed its Answer to said backpay specification.

The matter was heard before me in Pittsburgh, Pennsylvania, on October 20-21, 1980, with all parties represented. As a consequence of certain admissions made by the Respondent in his answer to the backpay specification, as supplemented by certain admissions made by counsel for the Respondent at the trial, the number of issues remained to be resolved were substantially reduced. Those remaining to be considered are whether the Respondent is liable for any backpay at all in view of its contention that such sums were waived by virture of certain conduct on the part of the Charging Union and/or certain of the discriminatees which Respondent contends, constituted a waiver of any backpay. Respondent further contends that the formula utilized by the General Counsel for computing gross backpay was not accurate. Finally, Respondent argues that the net backpay due to discriminatee Long should not be allowed because of wilful idleness on the part of Long during the backpay period.[3]

After the close of the hearing, counsel for the General Counsel and counsel for the Respondent filed helpful post-hearing briefs which have been duly considered. Subsequently, Respondent sought to file a Reply Brief. Counsel for General Counsel moved to strike such Reply Brief on the grounds that such briefs are not provided for under the Board's Rules and Regulations, and therefore must be rejected by an Administrative Law Judge. I agree with the position taken by counsel for

---

[3]Respondent does not dispute the interim earnings figures on the part of the remaining discriminatees.

the General Counsel, and therefore grant her Motion to Strike. No consideration was given to the said Reply Brief in the consideration of this case.

A. The Waiver Issue

At the hearing, counsel for the General Counsel moved to strike paragraph 9 of the Respondent's answer to the specification. In substance, the answer contended that the Charging Party waived payment of net backpay to each discriminatee in consideration for the Respondent's entering into the collective-bargaining agreement which was subsequently agreed upon between the Respondent and the Charging Party. Further, the Respondent contended that each discriminatee except for Glesk and Struniak waived receipt of net backpay by accepting a certain sum of money in settlement of such discriminatee's claim in this case.

At the outset, counsel for the General Counsel contends that the issue of the Union's withdrawal of the charges in this case as a consequence of Respondent's offer of better wage rates and other working conditions, which allegedly constituted a waiver of the backpay due to the discriminatees herein, was raised and ruled upon by the administrative law judge in the original proceeding. It does appear that the issue was raised by the Respondent to the administrative law judge in the original proceeding, but the judge did not deem it necessary to make a finding on the issue because, as he stated:

> . . . assuming, *arguendo*, that such a commitment was made, that sort of agreement does not detract from the power of the Board to exercise its 'lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Such discretion to dismiss charges will be exercised only when the unfair labor practices are substantially remedied and when, in the Board's considered judgment, such dismissal would effectuate the policies of the Act.' (Citing cases.)[4]

[4]Slip opinion, at page 23.

The Board did not see fit to upset or reverse the foregoing language of the administrative law judge; accordingly, I deem myself bound by the prior ruling as the law of the case.

A similar ruling is made with respect to Respondent's contention that four of the discriminatees accepted lesser sums in settlement of the claims made on their behalf in the instant case. It is well settled that an individual may not waive, bargain away or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle.

Accordingly, based upon the foregoing, I granted counsel for the General Counsel's motion to strike paragraph 9 of the Respondent's answer to the specification, and adhere to that ruling in my decision today.

B. The Backpay Formula Issue

The specification alleges a formula for computing gross backpay due each of the discriminatees named above. Such formula is a familiar one in which it is attempted to compute as nearly as possible the number of hours which would have been worked by each discriminatee during the backpay period, based upon the average number of hours worked by each discriminatee during each week of the 6-month period preceding their discharge. Included in the average weekly adjusted hours of each discriminatee is an amount for overtime hours which were converted to their straight time equivalent and holiday pay. The Respondent's answer denies the allegation "as stated," and affirmatively alleges a lesser number of hours per week which the discriminatees would have worked during the backpay period. However, Respondent's answer does not set forth any formula it utilized to arrive at such figures.

At the hearing, counsel for the General Counsel moved to strike so much of the Respondent's answer which set forth the conclusionary figures which purportedly reflected the average

weekly adjusted hours for each of the discriminatees during the backpay period. This motion was based upon lack of specificity required under Section 102.54 of the Board's Rules and Regulations particularly subsections (b) and (c) of that section.[5]

At the hearing, I denied the motion of the General Counsel based upon several factors which I considered important

---

[5]The following is the specific language of those subsections:

Section 102.54 Answer to specification:

(b) Contents of the answer to specification.—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. *As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.*

(c) Effect of failure to answer or to plead specifically and in detail to the specification.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation. (Emphasis supplied.)

and significant in the circumstances of this case: (1) the failure of the counsel for the General Counsel prior to the day of the hearing to notify counsel for the Respondent of her intent to make such a motion and clarify the issue in view of the time which had elapsed between the filing of the answer and the day of the hearing; (2) the possible unjust enrichment of the discriminatees based solely upon a technicality of pleading; and (3) the representation by counsel for the Respondent at the hearing that on the Friday preceding the hearing, there was a conference between representatives of the General Counsel and representatives of the Respondent in which the positions of each party were explored and that based upon such conference, the Respondent was "ready to stipulate without any testimony, exactly what the hours are."[6]

In her brief, counsel for the General Counsel again urges the administrative law judge to reconsider his ruling and to grant her motion in light of the specific requirements set forth in Section 102.54(b) and (c). I am inclined to so reconsider my ruling at the hearing in the light of a recent case decided by the Board on September 30, 1980, entitled *Standard Materials, Inc.*, 252 NLRB No. 94. In that case, as in the case at bar, the General Counsel moved to strike certain of the allegations in Respondent's answer to backpay specifications based upon the fact that Respondent only generally denied various allegations of the specification without setting forth alternative formulas or figures for any of the backpay computations. The Board granted the motion of the General Counsel in that case, stating as follows:

> The Respondent in its answer and amended answer generally denied various of the allegations of the backpay computations, including, *inter alia*, vacation pay, overtime, backpay periods, the rates of pay the discriminatees

[6]However, in response, counsel for the General Counsel stated that the Respondent offered no information concerning a method used to calculate the hours worked by the discriminatees.

> received at the time they were unlawfully discharged, the rate of pay each of them would have received during the backpay period, and the gross backpay due each discriminatee. Since this data is within the Respondent's knowledge, its failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.54(b) of the Board's Rules and Regulations. Accordingly, we strike the Respondent's answer and amended answer to those allegations of the backpay specification and, accordingly, deem such allegations to be admitted as true.[7]

Based upon all of the foregoing, I hereby reverse my ruling at the hearing respecting the allegations of paragraph 3 of the specification and strike the figures set forth by the Respondent in paragraph 3 of its answer to the backpay specification. I further find that the formula utilized by the Regional Director for the computation of gross backpay to be a reasonable and traditional one in cases in this kind, and therefore appropriate for the computation of gross backpay for the discriminatees in this case.

C. The Net Backpay Due Discriminatee Jeffrey Long

As set forth above, the Respondent at the hearing agreed with the Board's representatives respecting the interim earnings of all of the discriminatees except that of Long whom it felt did not make an adequate and reasonable search for desirable new employment during the backpay period. We come now to a consideration of the evidence bearing upon this issue.

The backpay period of discriminatee Jeffrey Long begins on December 19, 1977, when he was terminated and ends on November 17, 1979, when Long accepted Respondent's offer of reinstatement. With respect to his search for new employ-

---

[7]Slip opinion, at page 5; see also *3 States Trucking, Inc., et al.*, 252 NLRB No. 153.

ment, the record shows that Long immediately filed application with the state unemployment office and continued to make weekly filings from that time until December 16, 1978. However, no employment of Long resulted from his applications with the unemployment office. He received only one referral by that office, but did not secure the job.

In addition to unemployment filings, Long also put in applications at three grocery stores during this period, but was not successful in securing employment at either of these businesses. Indeed, his only work during the first part of the backpay period was working for a friend, Sharpetta, who owned and operated a one-man business called WOW (Wash on Wheels). Long testified that he worked off loans of approximately $800 which Sharpetta had made to him.

The record reflects that Long finally secured steady employment in the third quarter of 1978 when he commenced working for two of the companies owned by William Fiore.[5] The evidence shows that he worked steadily for these companies during the latter part of 1978 and into the fourth quarter of 1979 when he was laid off. He then received and accepted an offer from the Respondent and returned to work for the Respondent on or about November 17, 1979.

At the hearing, Respondent sought to prove that Long had failed to secure work and/or failed to work up to his full capability because of a "drinking problem." Long acknowledged that he had received medical attention because of a stomach ulcer, and that he did have a "drinking problem" for a period of time during the backpay period. However, he denied that such "problem" resulted in any loss or work, and I conclude that the Respondent failed to establish by substantial evidence that Long failed to secure suitable alternate employment or lost time at his interim employment because of such problem.

---

[5]The names of the companies are Diamond Excavating and Hauling, Inc. and Bill's Trucking, Inc.

In sum, I conclude and therefore find that the Respondent in this case did not sustain its burden of proving the affirmative defense alleged, to-wit: that Long willfully incurred loss of employment or neglected to make reasonable efforts to find interim work.[9] Indeed, it appears that discriminatee Long, in the instant case, made a more diligent effort to secure and retain employment than the discriminatee (Longest) in *Cornwell Company, Inc.*, 171 NLRB 342 (1968), in which the Board sustained the backpay award.[10]

Based upon all of the foregoing, I conclude and therefore find, that the backpay due Long, as well as that of the remainder of the discriminatees, as set forth in the backpay specification, is true and correct.

RECOMMENDED ORDER[11]

Upon the basis of the foregoing findings and conclusions, it is ordered that the Respondent, Michael M. Schaefer, an individual proprietor, his agents, successors, and assigns, shall pay to the employees involved in this proceeding, the sums set opposite their names together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), less any tax withholdings as are required by federal and state laws. Such amounts shall also be diminished by any monies paid by Respondent to any of the discriminatees by way of purported

---

[9]See *American Medical Insurance Company, Inc.*, 235 NLRB 1417, 1419 for a better articulated statement of the rule as set forth by the Board and the courts.

[10]See also *American Medical Insurance Company, Inc., supra.*

[11]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

settlement agreement.[12] The amount ordered to be paid the several discriminatees, subject to the foregoing deductions are as follows:

Richard G. Bumgardner	— $ 1,018.00
Michael Kerfonta	— $ 5,771.80
Philip Drinkwater	— $ 1,646.00
Raymond A. Glesk	— $ 2,040.50
Jeffrey L. Long	— $16,648.48
John G. Struniak	— $ 365.20

Dated, Washington, D.C. August 21, 1981

.....

ROBERT COHN
Administrative Law Judge

[12]Although reference to these amounts is made in the Backpay Specification, it is not clear, in my view of the record, that such amounts were deducted from gross backpay in the computations. However, it is clear that General Counsel agrees that such amounts should be deducted so that the mathematical computation made be resolved in the compliance stage of this proceeding.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3201

MICHAEL M. SCHAEFER, an individual proprietor,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

(NLRB No. 6-CA-11026)

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued: January 6, 1983

Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges

(Opinion Filed: January 19, 1983)

JAMES B. HECHT, ESQ. (Argued)
RICHARD V. SICA, ESQ.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, PA 15219
Attorneys for Petitioner

VIVIAN A. MILLER
MENDELSSOHN V. MCLEAN (Argued)
Attorneys

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

ELLIOTT MOORE
Deputy-Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570
Attorneys for Respondent

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Michael M. Schaefer, an employer, petitions for review of an order of the National Labor Relations Board directing him to pay certain employees backpay. The Board cross-petitions for enforcement of its backpay order. We enforce the Board's order.

I

Schaefer is engaged in the recovery, sale and distribution of slag and other raw materials. His business has about 250 employees, represented by several different labor organizations. The unfair labor practice charges leading to this proceeding grew out of the efforts of the International Union of Operating Engineers, Local 66 (Operating Engineers or Union), in 1977, to organize a small unit of unorganized employees who repaired Schaefer's trucks. Schaefer preferred doing business with Laborers Local 1058 and attempted, during the Operating Engineers' organizing effort, to assist Local 1058. In October of 1977 the Operating Engineers filed a

representation petition and the Laborers Union intervened. An agreement for a Consent Election was executed and a Board supervised election held on December 15, 1977. Despite Schaefer's continued support for the Laborers Union, of ten eligible voters six voted for the Operating Engineers, which, on December 23, 1977, was certified as the exclusive collective bargaining representative for the truck repair unit.

Thereafter Schaefer engaged in conduct which resulted, on March 6, 1978, in the filing by the Operating Engineers of an unfair labor practice charge with the Board. On April 27, the General Counsel filed a complaint, subsequently amended, charging that Schaefer discharged or laid off six employees for engaging in protected activities, in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) (1976). A hearing on the complaint was held in October, 1978.

After the unfair labor practice charge was filed Schaefer and the Operating Engineers Union pursued collective bargaining, in which the question arose whether the Union would withdraw the charge. When informed of this the General Counsel filed an amendment to the complaint, charging an unlawful refusal to bargain in good faith in violation of section 8(a)(5), 29 U.S.C. §158(a)(5) (1976), in that Schaefer conditioned a collective bargaining agreement on a promise to withdraw the charges. Schaefer denied that an agreement was so conditioned, but alleged as an affirmative defense that in consideration of other concessions the Operating Engineers did agree that the charges would be withdrawn.

The Administrative Law Judge found that Schaefer violated section 8(a)(1) in laying off or discharging six employees. He did not find a section 8(a)(5) violation, however, because the evidence did not support the allegation that withdrawal of the charges was a condition of agreement. The Administrative Law Judge also rejected Schaefer's affirmative defense. Assuming, *arguendo*, that there was an agreement to withdraw

the charges, he ruled that the Union could not bind the General Counsel or the Board. A cease and desist order and a backpay order were recommended.

On consideration of exceptions by Schaefer and the General Counsel the Board modified the recommended order to require a more favorable offer of reinstatment to one employee, but otherwise affirmed. Thereafter Schaefer and the General Counsel executed a stipulation that the Regional Director for Region 6 could issue a notice of hearing on the amount of backpay due the six employees, and that "[i]n the event judicial proceedings are thereafter necessary to enforce or to review the Board's backpay determination, the only issue before the court will be the validity of the backpay computations for the six discriminatees listed in paragraph 2 above, as [Schaefer] concedes that in all respects the Board's Order of October 22, 1979, is valid and proper."

The Regional Director issued a Backpay Specification, to which Schaefer filed an Answer, in which he reasserted that the Operating Engineers had in the collective bargaining agreement waived backpay, for all discriminatees. He also alleged that four of the six discriminatees had accepted partial payments of backpay and executed releases for any balance. The General Counsel moved to strike both defenses. The Administrative Law Judge to whom the hearing on backpay liability was referred granted that motion, holding that he was bound by the prior ruling on waiver by the Union as law of the case. As to the releases, he ruled:

> It is well settled that an individual may not waive, bargain away or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle.

A recommended order proposed backpay to six employees totaling $27,489.98. The Board summarily affirmed the Ad-

ministrative Law Judge's backpay decision and adopted his backpay order.

These petitions followed. Schaefer contends that the backpay award is barred by the Union's agreement, and as to four employees, by their releases. The Board contends that the award is not barred by either, but that in any event those contentions may not be considered.

II

The Board's contention that Schaefer's objections to the backpay award cannot be considered rests on two theories. The first is that fairly construed the stipulation which Schaefer executed waived the two defenses now tendered, leaving open nothing but computation of backpay amounts which are not disputed. The second is that by failing to petition for review at the time the Board affirmed the unfair practice determination, Schaefer lost the opportunity to challenge anything but amount.

As to the first theory, we note that neither the Administrative Law Judge who heard the backpay case nor the Board treated Schaefer's stipulation as a waiver of the right to assert the defense that the Union's agreement should bind the Board. Moreover, even if it had been so construed, it would not cover the subsequently executed releases by four employees. The Board's apparent conclusion as to the intended effect of the stipulation is that Schaefer reserved the right to object, in a proceeding seeking judicial review, on the two grounds here asserted. That interpretation is both reasonable and consistent with sound policy. It will usually make sense for an employer, who has been found to have committed an unfair labor practice and ordered to reinstate employees with backpay, to postpone a decision as to judicial review until his exposure has been fully determined. Otherwise the courts of appeals may be burdened with petitions for review in cases which might otherwise be

deemed too insignificant for employers to seek review. The Board's interpretation of the stipulation is consistent with that policy.

We also reject the General Counsel's contention that by failing to petition for review of the initial Board decision Schaefer lost that opportunity as a matter of law. Review here is governed by section 10(f), 29 U.S.C. §160(f)(1976). That section contains no time limit. *E.g., Buchanan v. NLRB*, 597 F.2d 388, 392 (4th Cir. 1979); *Griffith Co. v. NLRB*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977); *Kovach v. NLRB*, 229 F.2d 138, 141 (7th Cir. 1956). *Cf. International Union of Electrical, Radio & Machine Workers v. NLRB*, 610 F.2d 956 (D.C. Cir. 1979). The governing principle with respect to timeliness is laches, which obviously has no application to a situation in which an employer decides to postpone seeking judicial review of the underlying order until the full extent of his liability is determined. The General Counsel can point to no prejudice to the public's interest in unfair labor practice enforcement proceedings from employers following that intelligent course. If the General Counsel felt that judicial enforcement of other features of the order were appropriate in the interim, he was free to proceed sooner under section 10(e), 29 U.S.C. §160(e) (1976).

Thus we reject the Board's position that Schaefer's contentions may not be considered.

III

Schaefer contends that the Board should have refrained from proceeding with a backpay determination because of the private agreements made between him and the Union that the charges should be withdrawn, or at least, as to four employees, between him and them. He argues that the backpay award is in the circumstances here presented barred by the so-called *Spielberg-Collyer* doctrine. This court in *NLRB v. Pincus*

Brothers, Inc.—Maxwell, 620 F.2d 367 (3d Cir. 1980), approved the Board's policy of deferring, in some cases, to resolution by arbitration of disputes involving potential unfair labor practices within its jurisdiction. *Id.* at 371-75. *Pincus Brothers* did not involve deferral to mere private agreements, as distinct from arbitrations pursuant to the grievance-arbitration provisions of a collective bargaining agreement. There is authority, however, for the proposition that the *Spielberg-Collyer* doctrine applies to private settlement agreements negotiated in good faith involving mutual concessions and benefits. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (4th Cir. 1981); *Krause Honda, Ltd.*, 8 AMR ¶18.221 (1981); *Beloit Corporation*, 6 AMR ¶14.177 (1979); *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501 (1979); *Central Cartage Company*, 206 NLRB 337 (1973). This court has never approved deferral expect to an arbitration proceeding. Assuming, without deciding, that we would approve Board deferral to private non-arbitral settlements of disputes involving violation of rights protected by section 7 of the Act, 29 U.S.C. §157 (1976), we conclude that deferral certainly was not required in this instance.

In *Pincus Brothers* three opinions were written. Judge Garth, in reviewing a Board's decision not to defer to an arbitral decision, took the position that failure to defer was an error of law warranting reversal in every case. 620 F.2d at 384 (Garth, J., concurring). The author of this opinion, dissenting, took the position that deferral should be disapproved as a matter of law in cases involving alleged violations of section 7 rights, but that at least in every such case the Board's discretion to hear the case should be upheld. 620 F.2d at 398-99 (Gibbons, J., dissenting). Judge Rosenn's position was that the standard of review of a decision not to defer was abuse of discretion. 620 F.2d at 372. In finding an abuse of discretion he relied on the facts that the parties had chosen arbitration, a preferred method of resolving industrial disputes, that the arbitrator

considered the substance of the unfair labor practice charges,[1] and that the arbitrator's findings were not clearly repugnant to the act, 620 F.2d at 374. The differences between the *Pincus Brothers* dissent[2] and Judge Rosenn's position need not be resolved in this case, because applying Judge Rosenn's standards the Board's backpay order must be enforced.

The author of this opinion still adheres to the views expressed in the *Pincus Brothers* dissent, which need not be elaborated upon. The differences between the *Pincus Brothers* dissent and Judge Rosenn's position need not be resolved in this case, however, for applying his standards the Board's backpay order must be enforced. He emphasized that the arbitration proceedings must be fair and regular. In this case there were no proceedings. He emphasized that the merits of the unfair labor practice claim must have been discussed and considered. Schaefer made no showing that the merits of the section 8(a)(1) charge were discussed and considered either by the Union or by the employees who gave releases. The Board has been much less willing to defer, even to arbitral fora, when rights protected by section 7 are involved because of the great public interest in protecting those rights, as distinguished from non-statutory contract rights, *E.g., Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 330 (7th Cir. 1976); *General American Transportation Corp.*, 228 NLRB 808 (1977). Given the higher scrutiny required by the Board in cases involving section 7 rights, the absence of a formal arbitration, and the absence of any information as to what scrutiny was given to the claimed violations in the two private settlements on which Schaefer relies, we cannot hold that the Board abused its discretion in entertaining the unfair labor practice claims and in awarding backpay. For the present case we need go no further.

[1] *See* Hammermill Paper Co. v. NLRB, 658 F.2d 155, 160-161 (3d Cir. 1981).

[2] The dissent is obviously closer to Judge Rosenn's abuse of discretion standard than to that espoused by Judge Garth.

IV

Since Schaefer does not contest the unfair labor practice charges or the backpay calculations, his petition for review will be denied, and the Board's order will be enforced in full.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3201

MICHAEL M. SCHAEFER,
an individual proprietor,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

(NLRB No. 6-CA-11026)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

By the Court,

JOHN J. GIBBONS
Judge

Dated: March 11, 1983

GARTH, *Circuit Judge*, dissenting from denial of rehearing.

I would grant Schaefer's petition for rehearing for at least three reasons.

First, I believe the *Schaefer* holding is in direct conflict with this court's earlier decision in *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980). Second, the standard by which the Board's deferral practice must be measured has yet to be definitively established by this court. Third, this court has yet to address the question whether a private settlement agreement must be accorded the same deference as an arbitral award and, if so, the standard to be applied.

As I read the court's opinion in *Schaefer v. NLRB*, No. 82-3201 (3d Cir. Jan. 19, 1983), it appears clear to me that what had been Judge Gibbon's dissenting, and therefore minority, position in *Pincus Brothers, supra*, 620 F.2d at 384-99 (Gibbons, J., dissenting), has now in effect become this court's majority position in *Schaefer*. This doctrinal reversal has been accomplished not by our court sitting *in banc*, as our procedures require in such a case, *see* Third Cir. Int. Op. P. ch. VIII (c), but rather by a panel decision which apparently disagrees with the concepts espoused by the majority of the *Pincus* panel.

Moreover, in *Pincus* the panel was divided with respect to the standard to be applied in reviewing the Board's *Spielberg-Collyer* deferral practice to an arbitration award. Judge Rosenn applied an abuse-of-discretion standard to such awards. *Pincus Brothers, supra*, 620 F.2d at 372-74. On the other hand, I applied an error-of-law standard; it is my view that once a policy determination has been announced by the Board, it has the effect of any other rule of law, *Id.* at 377-82 (Garth, J., concurring). Judge Gibbons, of course, dissented in *Pincus Brothers, Id.* at 384-99 (Gibbons, J., dissenting). As a result, the court in *Pincus Brothers* adopted no standard of review, but held that under either a "legal error" or discretionary standard, the Board should have deferred to arbitration.

Subsequent decisions of this court, citing to *Pincus Brothers*, have assumed without discussion, and apparently without the issue of appropriate standard being raised, that an abuse-of-discretion standard governs. *See NLRB v. General Warehouse Corp.*, 643 F.2d 965, 968 (3d Cir. 1981); *cf. Hammermill Paper Co. v. NLRB*, 658 F.2d 155, 159, 161 (3d Cir. 1981), *see* 665 F.2d 56 (Garth, J., dissenting from denial of rehearing). While I would urge that this court should adopt the error-of-law standard which I advocated in *Pincus Brothers*, I recognize that whether I prevail in this respect or not is less important to our jurisprudence than the definitive selection and adoption of a standard which has the authority of the court. This feature of *Schaefer* alone more than satisfies the criteria for rehearing *in banc*.

In addition, this court has yet to address the question of whether a private settlement agreement is subject to deferral by the Board as is an arbitration. To this extent the issue is a matter of first impression for our court. Moreover, the standard to apply to deferral in a private settlement context has never been announced for this court, and apparently remains unsettled in other jurisdictions as well. *See Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 419 (4th Cir. 1981).

Finally, I question the *Schaefer* panel's approval of the Board's actions denying deferral to the agreement made between Schaefer and the Union. First, the Schaefer employees apparently received consideration for the withdrawal of charges. *Id.* at 3. Because the panel opinion affirms the Board's award of backpay, the employees presumably will now receive double compensation. Second, the Board itself would apparently defer to such a private settlement agreement. Indeed, the opinion in *Schaefer*, citing Board precedent and *Roadway Express, supra*, concedes that the Board's *Spielberg-Collyer* doctrine applies to private settlement agreements negotiated in good faith just as it does to arbitration. *See Schaefer, supra*.

slip op. at 7. As I have previously indicated, in my view the Board must live by the rules it has established, *see Pincus Brothers, supra*, 620 F.2d at 384 (Garth, J., concurring), and it is evident that the Board has yet to abandon its rule on deferral.

The issues which I have noted above are all presented in *Schaefer* and satisfy this court's rehearing criteria. I therefore vote for rehearing, because I believe that any one of these issues, alone or in combination, merits this court's consideration *in banc*.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL M. SCHAEFER, AN INDIVIDUAL PROPRIETOR,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 82-3201

JUDGMENT

Before: ALDISERT, GIBBONS and HIGGINBOTHAM, Circuit Judges

THIS CAUSE came on to be heard upon a petition filed by Michael M. Schaefer, An Individual Proprietor, West Elizabeth, Pennsylvania, to review an order of the National Labor Relations Board against said Petitioner, his agents, successors, and assigns, on May 21, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 6, 1983, and has considered the briefs and

transcript of record filed in this cause. On January 19, 1983, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order, and denying the Petition for Review.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, his agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

Certified as a true copy and issued in lieu
of a formal mandate on March 21, 1983.

Test:

Deputy Clerk, United States
Court of Appeals
for the Third Circuit.

BY THE COURT

_____
Circuit Judge

DATED: February 17, 1983

COPY

No. 82-1971

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL M. SCHAEFER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly ordered backpay for six employees petitioner had unlawfully laid off or discharged.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1971

MICHAEL M. SCHAEFER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-9c) is reported at 697 F.2d 558. The decision and order of the National Labor Relations Board (Pet. App. 1a-42a) are reported at 246 N.L.R.B. 181. The Board's supplemental decision and order (Pet. App. 1b-13b) are reported at 261 N.L.R.B. No. 42.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1e-2e) was entered on February 17, 1983. A petition for rehearing (Pet. App. 1d-4d) was denied on March 11, 1983. The petition for a writ of certiorari was filed on June 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. 2-4.

STATEMENT

1. Pursuant to a Board-conducted representation election, the International Union of Operating Engineers, Local 66, A, B, C, D & R, AFL-CIO ("Local 66"), was certified as the bargaining representative of a group of petitioner's employees. During the ensuing bargaining negotiations, Local 66 filed charges with the Board alleging, *inter alia*, that petitioner had unlawfully laid off or discharged six employees because of their support for Local 66.[1] Petitioner requested that Local 66 withdraw its unfair labor practice charges "in the interest of making relations between the parties 'neat and clean' and 'to have a good relationship with everyone'" (Pet. App. 26a). Local 66 agreed to do so (*ibid.*), but, in fact, did not withdraw the charges.

At the unfair labor practice hearing held on Local 66's charges, petitioner contended that the complaint should be dismissed because Local 66 had agreed to withdraw its charges in consideration for concessions made by petitioner during negotiations (Pet. App. 35a). The Administrative Law Judge ("ALJ"), whose decision was affirmed in relevant part by the Board, found that petitioner did not insist upon withdrawal of the charges as a condition of his agreement to the terms of the contract (Pet. App. 35a-36a).[2] The ALJ found it un-

---

[1] Local 66 filed a representation petition with the Board. Laborers' International Union of North America, Local 1058, AFL-CIO ("Local 1058") intervened and both unions participated in the ensuing election campaign which was won by Local 66 (Pet. App. 12a). Both unions represented other groups of petitioner's employees (*id.* at 11a). In its unfair labor practice charges, Local 66 also alleged that petitioner unlawfully assisted Local 1058 during the campaign and interrogated employees about their union activities.

[2] Accordingly, the ALJ rejected the General Counsel's allegation that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by improperly conditioning bargaining on withdrawal of Board charges.

necessary to determine the exact nature of the agreement between petitioner and Local 66. When an agreement to settle unfair labor charges is reached *after* Board proceedings have commenced, the NLRB will exercise its discretion to defer to such an agreement "'only when the unfair labor practices are substantially remedied and when * * * such dismissal would effectuate the policies of the Act'" (Pet. App. 36a). Since "the alleged agreement to withdraw the charges would have provided no remedy at all for the persons found here to have been discriminatorily laid off," the ALJ concluded that it would not effectuate the policies of the Act to defer to it (*ibid.*).

On the merits, the ALJ found, and the Board agreed, that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off or discharging the six employees because of their support for Local 66. The Board ordered petitioner, *inter alia*, to reinstate the two employees who had not previously been recalled and to make all six employees whole for losses suffered as a result of the unfair labor practices. (Pet. App. 3a-4a, 36a-38a.)

2. Petitioner complied with the Board's order, except that he failed to reach agreement with the Board's Regional Office as to the amount of backpay due the six employees. Accordingly, after obtaining a stipulation from petitioner that he had no objection to the Board's order but had been unable to reach agreement on backpay,[3] the Regional Director issued a backpay specifica-

[3] The Board's Rules and Regulations, 29 C.F.R. 102.52, authorize the Board's regional directors to notice backpay disputes for hearing before an administrative law judge. However, the Board has determined that it is inadvisable to litigate disputes about the amount of a party's backpay liability when the party is still free to seek review of the underlying Board decision and order that is the basis for liability. Accordingly, absent agreement by the affected party to accept the underlying decision and

tion and notice of hearing that set forth the amounts that the Director had computed that petitioner owed the named discriminatees (C.A. App. 45-51). Thereafter, a backpay hearing was held before an administrative law judge in which petitioner repeated his contention that no backpay was owed because Local 66 had waived it in consideration for petitioner's entering into the collective bargaining agreement. Petitioner also asserted that four discriminatees had waived backpay by accepting money in settlement of their backpay claims.[4]

---

order, "[i]t is the ordinary practice of the Board not to consider the amount of backpay until its general remedial order has been enforced by the court on its merits, in order to avoid unnecessary efforts if enforcement be denied." *NLRB* v. *Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 106 (7th Cir.), cert. denied, 419 U.S. 834 (1974). Where the party does not intend to contest the validity of the underlying decision, it is the Board's policy to obtain a stipulation to that effect from the respondent and proceed directly to a backpay determination. N.L.R.B., *Case-Handling Manual* (Pt. 3) § 10652 (1977).

The stipulation signed by petitioner, on April 23, 1980, stated that he had "no objection to the Board's order," that he had "not been able to reach agreement with the General Counsel as to the amount of backpay due" the discriminatees, and that, in any judicial proceedings "to enforce or to review the Board's backpay determination, the only issue before the court [would] be the validity of the backpay computations" since petitioner "concedes that in all respects the Board's Order [of October 22, 1979], is valid and proper" (C.A. App. 43-44).

[4] In November 1979, several weeks after issuance of the Board's decision and order, petitioner offered payments to the six employees in exchange for a waiver of any backpay to which they would be entitled under the Board's order. Four employees accepted the offer (Pet. App. 6b).

The four employees signed a statement which read (C.A. App. 326-329):

> I accept the following amount [ ] in full payment for lost wages including interest based on my earnings since my lay-off.
>
> I intend to be legally bound by this document.

The ALJ, whose decision was affirmed by the Board, rejected petitioner's waiver contentions. The ALJ pointed out that he was bound by the Board's rejection in the underlying unfair labor practice proceeding of the claim of a waiver by Local 66 (Pet. App. 6b-7b). With respect to the alleged waiver by the four employees, the ALJ stated that such claims could not be waived, "since it is not a private right which attaches to the discriminatee, but is * * * a public right which only the Board or the Regional Director may settle" (Pet. App. 7b). However, in determining the amount of backpay due the employees, the ALJ's specification reflected deductions for the amounts petitioner paid to the four employees (Pet. App. 2b n.5).

3. The court of appeals upheld the Board's backpay order (Pet. App. 2c).[5] The court held that the Board had not abused its discretion in resolving the unfair labor practice complaint despite waivers given by the four employees and Local 66's agreement in the bargaining negotiations to withdraw the charges. The court pointed out that the merits of the unfair labor practice charges were not discussed and considered by

---

The sums received by the employees were Bumgardner, $400.00; Drinkwater, $700.00; Kerfonta, $750.00; Long, $500.00 (C.A. App. 326-329).

[5] The Board contended in the court of appeals that petitioner's agreement to the April 23 stipulation (*supra*, note 3) precluded him from challenging any issue except the computation of backpay. In rejecting the Board's position, the court asserted that the Board did not view the stipulation as a waiver of the right to seek judicial review of the underlying Board decision (Pet. App. 5c). Contrary to the court's understanding, the Board does maintain that the stipulation constituted a waiver of petitioner's right to seek judicial review of all issues except backpay computation. Should the petition for a writ of certiorari be granted, the Board will argue that the judgment of the court of appeals should be upheld on that additional ground.

the Union or by the employees who gave the releases (*id.* at 8c).

ARGUMENT

Petitioner contends (Pet. 8-12) that the Board's decision is contrary to settled Board policy and that the decision of the court of appeals conflicts with that of the Fourth Circuit in *Roadway Express, Inc.* v. *NLRB*, 647 F.2d 415 (1981). There is no merit to these contentions.

1. It is the Board's policy to encourage all-party, private resolution of labor disputes. To that end, the Board will defer to such settlements when they resolve unfair labor practice charges and are not repugnant to the policies of the Act. Thus, in *Coca-Cola Bottling Co. of Los Angeles*, 243 N.L.R.B. 501, 502 (1979), the union, the suspended employee and the employer entered into a post-charge, pre-arbitration settlement that resolved the matter at issue in the unfair labor practice proceeding and provided for reinstatement without backpay. In those circumstances, the Board held that the employer did not violate Section 8(a)(1) of the Act by conditioning reinstatement on withdrawal of the Board charge, pointing out that "[t]he settlement agreement was the product of negotiations during which each of the parties made concessions." Similarly, in *Central Cartage Co.*, 206 N.L.R.B. 337, 338 (1973), the Board deferred to a settlement agreement entered into by the union, the involved employee (Dominiak) and the employer that resolved a work dispute issue pending before the Board. The Board noted that "[t]he settlement clearly indicates that all issues in dispute were considered and appropriately resolved in a manner which disposes of not only the Dominiak matter but also similar issues involving related job assignments." See also *Krause Honda, Ltd.*, 8 N.L.R.B. Advice Memo. Rep. ¶ 18,221 (1981) (recommending dismissal of charge, where the union, employer and employee

agreed to reinstatement conditioned on employee passing a welding test); *Beloit Corp., Jones Division*, 6 N.L.R.B. Advice Memo. Rep. ¶ 14,177 (1979) (recommending dismissal where all parties agreed to settlement involving reduction of discipline).

However, where a private settlement does not involve the consent of all the affected parties or does not substantially remedy the unfair labor practices alleged before the Board, the Board will not defer to it. Thus, in *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 854 (1978), the Board refused to defer to a settlement that provided for the execution of a collective agreement, but provided no remedy for certain alleged violations of Section 8(a)(1) of the Act, and also provided for reinstatement but with no backpay for unfair labor practice strikers. The Board noted that the employees had not been made aware of their absolute right to reinstatement when they approved the settlement and found that the execution of the contract did not effectively remedy the unfair labor practices. Similarly, in *Local Union No. 2, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry*, 152 N.L.R.B. 1093, 1112, 1113 (1965), enforced, 360 F.2d 428 (2d Cir. 1966), the Board refused to defer to a strike settlement agreement in which the employer and the affected employees did not participate and which did not resolve the alleged unfair labor practices at issue in the Board proceeding. Moreover, the Board will not defer to a private settlement where the alleged violation at issue in the unfair labor practice proceeding was not raised or resolved during the settlement negotiations. *Sabine Towing & Transportation Co.*, 224 N.L.R.B. 941 (1976); accord, *Owens Corning Fiberglas Co.*, 236 N.L.R.B. 479 (1978).

Assuming arguendo, as did the ALJ (Pet. App. 36a), that Local 66 agreed to withdraw the unfair labor practice charges during contract negotiations, that agree-

ment, as the ALJ found (*ibid.*), did not resolve or remedy the alleged unfair labor practices.[6] Moreover, the affected employees did not participate in or approve it. Accordingly, the agreement plainly would not have met the criteria established by the Board for deferral to private settlements. In the circumstances, it was unnecessary for the ALJ to resolve the issue of whether such an agreement was actually made.

The waivers signed by the employees in exchange for a cash settlement of their backpay claims also did not meet the Board's criteria. All of the cases relied upon by petitioner (see pages 6-7, *supra*) involved settlements *before* issuance of the Board's decision. The employees' waivers here were not, in fact, in settlement of an unresolved unfair labor practice, but merely a compromise of a backpay claim. The Board does not consider such a compromise to be a substantial remedy for an

---

[6] Contrary to petitioner's assertion (Pet. 5), the Board did not find that petitioner agreed to more favorable contract terms in exchange for withdrawal of the charges. Rather, the ALJ found that the favorable bargaining terms that the employees obtained were a result of their selection of Local 66 as bargaining agent, rather than Local 1058, and that was the reason petitioner had unlawfully assisted Local 1058 during the election campaign (Pet. App. 30a). The ALJ specifically rejected petitioner's assertion that contract concessions were conditioned on withdrawal of the charges (*id.* at 35a-36a).

unfair labor practice.[7] See, *e.g.*, *Robinson Freight Lines*, 117 N.L.R.B. 1483, 1486 (1957).

2. Petitioner, relying on *Roadway Express Inc.* v. *NLRB*, 647 F.2d 415 (4th Cir. 1981), contends (Pet. 10-12) that deferral to a private settlement, as distinct from an arbitral award, is appropriate even if the alleged unfair labor practice is not resolved therein. There is no merit to that contention.

In *Roadway Express, Inc., supra*, 647 F.2d at 424-425; footnote omitted, the Fourth Circuit agreed with the Board that deferral to a private settlement "will not be appropriate if the merits of the claim which are the subject-matter of the settlement and of the Labor Board proceeding were never discussed or considered in the settlement negotiations,"[8] citing *Sabine Towing & Transportation, supra; Owens Corning Fiberglas Co., supra.*[9] Similarly, in finding here that the

---

[7] There is no merit to petitioner's assertion (Pet. 8) that the employees will be "unjustly enriched." The backpay specification took into account the amounts paid to them by petitioner (Pet. App. 2b n.5).

That the backpay compromise offered by petitioner did not substantially remedy the unfair labor practice is shown by comparison of the amount tendered by petitioner and the backpay ordered by the Board: Bumgardner, $400 from petitioner and $1,018 backpay; Drinkwater, $700 from petitioner and $1,646 backpay; Kerfonta, $750 from petitioner and $5,771.80 backpay; Long, $500 from petitioner and $16,648.48 backpay (Pet. App. 13b).

[8] In *Roadway Express*, the court found on the facts presented that the propriety of the discharge had been discussed in the settlement negotiations (647 F.2d at 425).

[9] Petitioner's assertion (Pet. 10)—that "no settlement agreement can pass muster" if scrutiny must be given to the claimed unfair labor practice because, since there is no arbitration proceeding, there is no opportunity for such scrutiny—misconstrues the Board's policy. That policy does not require a formal resolution of the unfair labor practice claim, but only that it be addressed, resolved and substantially remedied.

Board had not abused its discretion in conducting the backpay proceeding the court of appeals noted that the merits of the claimed violations had not been addressed (Pet. App. 8c). There is, thus, no difference in this respect between the decision below and that in *Roadway Express*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

JULY 1983

Petitioner appears to suggest (Pet. 8-9) that the court below held that the Board need not defer to a private settlement. The court did not so hold. Although it noted the lack of precedent in its circuit for the proposition that the Board should defer to private agreements as distinct from arbitration awards, it enforced the Board's order because it found that the established criteria for deferral were not met here.